No. 78-1329

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO TRIBE

UNITED STATES OF AMERICA, PETITIONER

v.

NEZ PERCE TRIBE OF IDAHO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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CITATIONS

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in these two cases.

OPINION BELOW

The opinion of the Court of Claims (App. A) is reported at 586 F.2d 192.

JURISDICTION

The decision of the Court of Claims was filed on October 18, 1978. On January 16, 1979, the Chief

Justice extended the time for filing a petition for a writ of certiorari to and including March 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether events and transactions occurring after August 13, 1946, may be a basis for awards of compensation under Section 2 of the Indian Claims Commission Act when such events and transactions can be labelled the continuation of a course of wrongful conduct initiated before that date.

STATUTE INVOLVED

The pertinent provisions of the Indian Claims Commission Act of August 13, 1946, Pub. L. No. 79-726, 60 Stat. 1049, as amended by the Act of October 8, 1976, Pub. L. No. 94-465, 90 Stat. 1990, are as follows:

> Sec. 1 [25 U.S.C. 70]. There is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.
>
> Sec. 2 [25 U.S.C. 70a]. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law

> or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.
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> * * * * *
>
> Sec. 12 [25 U.S.C. 70k]. The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.
>
> * * * * *
>
> Sec. 23 [25 U.S.C. 70v]. The existence of the Commission shall terminate at the end of fiscal year 1978 on September 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. Upon its dissolution, the records and files

of the Commission in all cases in which a final determination has been entered shall be delivered to the Archivist of the United States. No later than December 31, 1976, the Indian Claims Commission may certify and transfer to the Court of Claims all cases which the Commission determines it cannot completely adjudicate by September 30, 1978. In addition, the Commission may, at any time prior to September 30, 1978, certify and transfer to the Court of Claims any case which it determines cannot be completely adjudicated prior to the dissolution of the Commission. Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 2 of the Indian Claims Commission Act: *Provided*, That section 2 of said Act shall not apply to any cases filed originally in the Court of Claims under section 1505 of title 28, United States Code. Upon dissolution of the Commission, all pending cases including those on appeal shall be transferred to the Court of Claims for adjudication on the same basis as those authorized to be transferred by this section.

Sec. 24 [28 U.S.C. 1505]. The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive Orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

STATEMENT

Within the 5-year period allowed by Section 12 of the Indian Claims Commission Act, the Navajo Tribe and the Nez Perce Tribe of Idaho filed with the Indian Claims Commission actions for a complete accounting by the United States for all income from, and expenditures of, tribal property held in trust by the government. In due course, the government submitted such accountings for periods ending June 30, 1951.[1] In 1970, the United States and the Nez Perce Tribe entered into a stipulation settling the Indians' accounting claim "from the time the defendant took the responsibilities of trustee of the Nez Perce Tribe, to June 30, 1951 * * *," 23 Ind. Cl. Comm. 39, 45 (1970), and leaving to be prosecuted before the Commission the question whether the Tribe was entitled to an accounting for the period subsequent to July 1, 1951. 23 Ind. Cl. Comm. 39, 45, 67 (1970). No comparable agreement was reached in respect to the Navajo claim, but no question arises here as to the sufficiency of the accounting for the period before August 13, 1946.

In 1977, both the Navajo and Nez Perce cases were transferred by the Indian Claims Commission to the Court of Claims pursuant to Section 23 of the Indian Claims Commission Act, as amended by the Act of

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[1] The final accounting date was selected as a convenient approximation of the cut-off date for *filing* claims with the Commission under Section 12 of the Act. That was, in fact, over-generous to the Tribes, since, under Section 2, accounting was due only to August 13, 1946.

October 8, 1976.[2] Thereafter, the United States filed motions for summary judgment in both cases, contending that Section 2 of the Act deprived the Commission, and the Court of Claims sitting in its stead, of jurisdiction to require the United States to account for any transactions or events occurring after August 13, 1946.

On October 18, 1978, the Court of Claims denied these motions, holding that—

> If a wrongful course of governmental conduct began before August 13, 1946, the date of the enactment of the Indian Claims Commission Act of 1946, and continued thereafter, the Commission could properly take account of and award relief for the damages or injuries suffered after that date from the continuing course of conduct which began prior to that time.

The court relied, in part, on its earlier ruling in *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776 (1956), where the United States had advocated a similar rule.[3] It was

[2] The cited section (reproduced *supra*, pages 3-4) provided for the winding up of the Commission on September 30, 1978, and permitted the Commission to transfer to the court, before that date, cases which could not be completed by that date.

[3] In 1934 the Secretary of the Interior had determined that the Gila River Pima-Maricopa Indian Community was required to pay certain annual charges for the operation and maintenance of Coolidge Dam and the San Carlos Irrigation Project. In an action filed before the Indian Claims Commission, the Indians alleged that the Secretary did not have the authority to assess the charges, and sought to recover the amounts paid from 1934 to the time of the filing of the action. Shortly afterwards, the Indians filed a similar action before the Court of Claims, seeking recovery only for charges assessed subsequent to August 13, 1946. In the Court of Claims case, attorneys for the United States sought a judgment on the pleadings, on the ground that the initial alleged wrong (the Secretary's determination that the Indians must pay operation and maintenance charges) having occurred prior to August 13, 1946, the entire case was properly before the Indian Claims Commission for adjudication. Although the Court of Claims denied this motion (140 F.Supp. 776 (1956)), its opinion indicated that it agreed that the claim for repayment for charges paid after August 13, 1946, could properly be entertained by the Indian Claims Commission. 140 F.Supp. at 781. On May 18, 1962, the Court of Claims entered an order dismissing the action filed in that court. The order stated that "the court concludes that the allegedly wrongful acts of the defendant first accrued, if at all, prior to 1946, and it is held that the Indian Claims Commission has jurisdiction to award just compensation for such acts, whether the full content thereof became apparent before or after 1946." 157 Ct.Cl. 941 (1962). The Indian Tribe did not appeal from the dismissal of the case in the Court of Claims, but pursued its case before the Indian Claims Commission, which eventually found in favor of the Indians with respect to liability (33 Ind.Cl.Comm. 18 (1974)) and determined the amount due the Tribe to be $2,930,338.83, plus interest (38 Ind.Cl.Comm. 1 (1976)). From these decisions of the Indian Claims Commission, the United States appealed to the Court of Claims, arguing this time that the Commission had no jurisdiction to award damages for any charges wrongfully assessed against the Tribe after August 13, 1946. On October 18, 1978, the Court of Claims upheld the jurisdiction of the Commission with respect to the post-1946 claims involved in that case. 585 F.2d 209. In so doing, the court relied upon its reasoning in the *Navajo* and *Nez Perce* cases (which, in turn, as the court pointed out, relied heavily on the precedent set in the earlier decisions in the *Gila* case). In all the circumstances, we have determined not to seek review of the Court of Claims decision in the *Gila* case. Cf. *Thompson* v. *INS*, 375 U.S. 384, 385-387 (1964).

stressed that the court had followed *Gila River* in sev-

eral subsequent cases, including *United States* v. *Southern Ute Tribe*, 423 F.2d 346 (1970), rev'd on other grounds, 402 U.S. 159 (1971). The court also noted that the United States had only "relatively recently" come to the conclusion that the Commission lacked jurisdiction over claims based on events and transactions occurring subsequent to August 13, 1946, the government having prepared accountings in both the *Nez Perce* and *Navajo* cases up to June 30, 1951, and having actually settled the Nez Perce claims through June 30, 1951.

REASONS FOR GRANTING THE PETITION

1. The holding that Section 2 of the Indian Claims Commission Act requires the United States to account for transactions and events occurring after August 13, 1946, may affect as many as 30 other cases which were transferred from the Commission to the Court of Claims and are now awaiting initial adjudication. The costs involved merely to prepare the cases for trial are enormous. Indeed, as the attached letter (App. B) from the Acting Director of the Indian Trust Accounting Division of the General Services Administration indicates, bringing the accounting up to the present date in the Navajo case alone may require additional expenditures of as much as $2.5 million. That estimate must be multiplied several times if the other pending cases must likewise be brought up to date. And we speak only of administrative costs; there may well be substantial additional sums

assessed against the United States in respect of events occurring after August 13, 1946.

These monetary considerations alone suggest the appropriateness of review by this Court before the litigants—the Indian tribes as well as the United States—embark on the protracted and expensive proceeding mandated by the Court of Claims. Nor is the government estopped by prior inconsistency or laches from now seeking the Court's intervention.

It is true that at various times the United States has taken positions or performed actions inconsistent with the position here advocated. But, of course, the government, no more than any other litigant, can confer on a court jurisdiction which Congress has withheld. *United States* v. *Porche*, 53 U.S. (12 How.) 426, 432 (1851). And no agent of the United States is authorized to override limitations on congressional waivers of sovereign immunity. *United States* v. *Shaw*, 309 U.S. 495, 501 (1940); *United States* v. *U.S. Fidelity and Guaranty Co.*, 309 U.S. 506, 513-514 (1940).

Moreover, at least since 1970, it has been the consistent position of the United States that, under Section 2 of the Indian Claims Commission Act, the Commission may consider only claims accruing on or before August 13, 1946. That was the primary question presented to this Court in August 1970, when the United States filed a petition for a writ of certiorari in *United States* v. *Southern Ute Tribe or Band of Indians*, No. 515, October Term, 1970. Petition at 7-11. Although the petition was granted (400 U.S.

915 (1970)) and the point now submitted was fully briefed and argued, the Court reversed the decision of the Court of Claims on grounds unrelated to the question of post-1946 jurisdiction of the Indian Claims Commission. *United States* v. *Southern Ute Tribe or Band of Indians*, 402 U.S. 159 (1971). The question persists, however, and remains as important now as it was in 1970.

2. In our submission, the decision below plainly violates the express congressional limitation on actions of the kind involved here. If this is so, the Court of Claims was acting beyond its jurisdiction, for it is of course well settled that suits against the United States must strictly comply with the Act of Congress which permits the action to be brought. *Minnesota* v. *United States*, 305 U.S. 382, 388 (1939); *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953); *United States* v. *King*, 395 U.S. 1, 4 (1969).

Section 2 of the Indian Claims Commission Act provides that "[n]o claim accruing after August 13, 1946, shall be considered by the [Indian Claims] Commission." Under general principles of law, a claim is deemed to "accrue" when a suit may first be instituted upon it. Accordingly, this Court has held that, unless clearly controlling language to the contrary is used, any act of Congress referring to the "accrual" of a claim, for the purpose of setting a limitation on the time for bringing a suit based on the claim, must be construed as referring to the time "when a suit may first be legally instituted upon it." *United States ex rel Louisville Cement Co.* v. *Interstate Commerce*

Commission, 246 U.S. 638, 644 (1918). Here, then, it seems obvious that a claim based upon events and transactions occurring after August 13, 1946, cannot be deemed to "accrue" until some date which is beyond the temporal limits of the jurisdiction of the Indian Claims Commission.

To be sure, it may be arguable that, in some circumstances, an accounting is due for post-1946 *consequences* of earlier wrongs. But that is not this case. Here, the claim is that the government continued, after August 1946, to commit the *same kinds* of wrongs—*e.g.*, payment of agency expenses with tribal funds—as it had before that date. As Judge Nichols, dissenting below, summarized the majority's holding (App. A, *infra*, 32a), the Court of Claims held "that the establishment of a bad precedent, before August 13, 1946, 'accrues' a claim for any wrong following that precedent that occurs thereafter." This, we submit, is to overstep the clear jurisdictional limitation imposed by Congress in Section 2 of the Indian Claims Commission Act, and to ignore the rule that federal waivers of sovereign immunity should be strictly construed. *Soriano* v. *United States*, 352 U.S. 270, 276 (1957); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Shaw*, 309 U.S. 495, 500-501 (1940).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1979

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

(Decided October 18, 1978)

Nos. 69, 299, 353 (Accounting Claims)

Ind. Cl. Comm. Docket Nos. 69, 299, 353
(Accounting Claims)
31 Ind. Cl. Comm. 40 (1973)
34 Ind. Cl. Comm. 432 1974)
36 Ind. Cl. Comm. 181, 433 (1975)
39 Ind. Cl. Comm. 10, 252 (1976)

THE NAVAJO TRIBE

v.

UNITED STATES

William C. Schaab, attorney of record, for plaintiff. *Dean K. Dunsmore* and *Craig A. Decker*, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

On Defendant's Motion for Partial Summary Judgment

No. 179-A
Ind. Cl. Comm. Docket No. 179-A
39 Ind. Cl. Comm. 127 (1976)

THE NEZ PERCE TRIBE OF IDAHO

v.

THE UNITED STATES

Frances L. Horn, for plaintiff; *Angelo A. Iadarola*, attorney of record. *Wilkinson, Cragun & Barker*, of counsel.

Dean K. Dunsmore and *Craig A. Decker*, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

On Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross-Motion for Summary Judgment and Dismissal

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Before FRIEDMAN, *Chief Judge*, DAVIS, NICHOLS, KUNZIG and BENNETT, *Judges*, *en banc*

DAVIS, *Judge*, delivered the opinion of the court:

These cases, transferred here from the Indian Claims Commission prior to its termination,[1] confront the court with the troublesome but important issue of the extent to which the Commission (and this

[1] Under the Act of Oct. 8, 1976, Pub. L. No. 94-465, 90 Stat. 1990, *as amended by* the Act of July 20, 1977, Pub. L. No. 95-69, 91 Stat. 273. This legislation provides for (1) the termination of the Commission no later than September 30, 1978; (2) transfer by the Commission to this court (prior to December 31, 1976 and thereafter) of any cases which the former determines it cannot completely adjudicate by September 30, 1978; (3) on dissolution of the Commission, transfer of all pending undetermined cases to this court. After transfer, this court has all powers the Commission has had under the Indian Claims Commission Act.

court, on transfer) can consider injuries done to Indian entities after August 13, 1946 (the date of enactment of the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70a-70w (1976)) or having their actual impact after that day.[2] Both cases are practically the same for present purposes and may be considered together in one opinion.[3]

I.

A. *The Navajo Tribe*: The Tribe timely filed with the Commission in 1950 a petition containing a claim for a complete accounting by the Government for all income and receipts from tribal property held in trust by the Government, and of all expenditures by the Government from tribal funds.[4] Accountings were supplied by the United States (beginning in 1961)

[2] The Claims Commission Act provides that no claim accruing after the enactment date (August 13, 1946) shall be considered by the Commission. 25 U.S.C. § 70a (1976). Claims accruing after that date come directly to this court under 28 U.S.C. § 1505. *See* Part II, *infra*, for fuller texts.

[3] We postponed oral argument for some time until at least five active judges were available to hear the cases. (Judge Kashiwa is disqualified and Judge Smith was not a member of the court when the cases were argued and submitted.)

[4] This was Indian Claims Commission Docket No. 69. Comparable, though more specific, accounting claims were stated in Dockets No. 299 and 353. The Government's accounting purported to cover all three dockets. In the course of the proceedings before the Commission, the latter two dockets were consolidated with No. 69, in order to put all of the Navajos' accounting claims into one case. *See* 31 Ind. Cl. Comm. 40, 40-42 (1973).

and the Indians excepted to portions. The complex details and procedural history need not be set forth because the principal issue we consider at this time is a general jurisdictional one arising in this instance from the following set of particular facts: First, the Tribe claimed that from time to time, both before and after August 13, 1946, the defendant wrongfully used various tribal funds to pay for expenses for the maintenance, administration and upkeep of federal Indian agencies which should not have been charged to the Indians (these are referred to in the record and arguments by the shorthand expression of "miscellaneous agency expenses"). The Commission held, first, that with respect to the period prior and up to August 13, 1946, the challenged disbursements were improper (and redress was within the Commission's jurisdiction), 31 Ind. Cl. Comm. 40 (1973); 34 Ind. Cl. Comm. 432 (1974);[5] second, that the Commission had authority to consider similar disbursements after August 13, 1946 if they were part of a continuing wrong which began before August 13, 1946 and continued thereafter, 36 Ind. Cl. Comm. 433, 434-35 (1975); 34 Ind. Cl. Comm. 432, 434-35 (1974); 31 Ind. Cl. Comm. 40, 53 (1973); and, third, that the plaintiff had shown that payments of agency expenses from Indian funds constituted a continuing wrong initiated before August 13, 1946 and therefore that the Tribe was entitled to an up-to-date account-

[5] These decisions are not now before us.

ing of these miscellaneous agency expenses. 39 Ind. Cl. Comm. 252 (1976).

A second, parallel, dispute over accounting claims, said to begin before August 13, 1946 and continue thereafter, concerned several "Individual Indian Money" (IIM) accounts in the Treasury. The Government resisted having to account for 35 of these accounts because those particular accounts did not exist, or have any activity, prior to August 14, 1946. The Commission denied, without prejudice, requests by defendant to exclude the 35 accounts from the accounting. 36 Ind. Cl. Comm. 181 (1975); 39 Ind. Cl. Comm. 10, 32 (1976). Thus, the Commission never finally decided this question of the 35 IIM accounts.

Thereafter, by order of December 27, 1976, the consolidated accounting claims (Nos. 69, 299, and 353) were transferred to this court. 39 Ind. Cl. Comm. 261 (1976). The trial judge to whom the case was assigned then gave the Government permission to file this motion for partial summary judgment on the issue of accounting to date (rather than merely to August 13, 1946).[6]

B. *The Nez Perce Tribe of Idaho*: The Nez Perce Tribe, through the Chief Joseph Band in the State of Washington, duly filed with the Commission a general accounting claim, *Nez Perce Tribe* v. *United States*,

[6] The trial judge's order was in terms limited to the issue of the "miscellaneous agency expenses," but we consider that, if permission was needed, defendant was also granted authority to include the problem of the 35 IIM accounts.

No. 179 (Ind. Cl. Comm., filed July 16, 1951). The Nez Perce Tribe of Idaho intervened. Docket No. 179 was settled as to all claims or demands up through June 30, 1951. *See* 23 Ind. Cl. Comm. 39 (1970). Excepted from this settlement and severed into Docket No. 179-A were all claims for the period after June 30, 1951.[7] In Docket No. 179-A little was done before the Commission. Defendant moved to dismiss that docket for lack of jurisdiction but this was denied. 39 Ind. Cl. Comm. 127 (1976). The Tribe then moved for partial summary judgment and supplemental accounting, asking that it be given an accounting of various funds and properties for the period after June 30, 1951.[8]

Defendant requested the Commission to transfer the case to this court without calling for a reply to the Tribe's motion. This was done on December 15, 1976,

[7] Plaintiff Nez Perce Tribe of Idaho was given the right to prosecute these post-June 1951 claims. *See* 23 Ind. Cl. Comm. 39, 68-69 (1970).

[8] The types of post-1951 tribal wrongs alleged by the Indians had to do with (1) use of tribal funds for defraying the cost of government functions, (2) "reverse spending" by defendant out of tribal funds, *e.g.*, payments out of interest-bearing principal when accumulated interest accounts (non-interest-bearing) could have been used instead, (3) failure to make certain non-interest-bearing funds productive, (4) management of the tribe's timber, mineral and range assets, and (5) management of plaintiff's funds not deposited in the Treasury. *See* Plaintiff's Motion for Partial Summary Judgment and Supplemental Accounting, *Nez Perce Tribe of Idaho* v. *United States*, No. 179-A (Ind. Cl. Comm. Nov. 22, 1976).

and the case has been here since that time. 39 Ind. Cl. Comm. 239, 240 (1976).

Before us now is the Tribe's motion (initially made to the Commission) for partial summary judgment and supplemental accounting, as well as defendant's cross-motion for summary judgment and dismissal on the ground that this court (on transfer from the Commission) has no jurisdiction over the claims because they are said to have arisen after August 13, 1946.

II.

The statutory scaffold for this controversy over Commission jurisdiction with respect to post-August 1946 transactions or omissions is composed of three planks: (1) section 2 of the Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1050 (codified at 25 U.S.C. § 70a (1976)) states that "No claim accruing after the date of the approval of this Act [August 13, 1946] shall be considered by the Commission"; (2) section 12 of the Act, ch. 959, 60 Stat. 1052 (codified at 25 U.S.C. § 70k (1976)), declares that "The Commission shall receive claims for a period of five years after the date of the approval of this Act [August 13, 1946] and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress"; and (3) section 24 of the Act, 60 Stat. 1055 (later codified in 28 U.S.C. § 1505 (1970)), which provided in rele-

vant part that "the jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act [August 13, 1946] in favor of any Indian tribe, band, or other identifiable group of American Indians * * * arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or group."[9]

It is now more than 22 years since the first interface, in this court, between these statutory provisions and the problem of Indian wrongs said to occur after August 13, 1946 but which had their roots in the earlier period. *Gila River Pima-Maricopa Indian Community* v. *United States*, 135 Ct. Cl. 180, 140 F. Supp. 776 (1956). The Gila River Pima-Maricopa Indians filed suit in this court on a number of claims which were identical to claims then pending before the Indian Claims Commission except that the plaintiffs sought damages in this court only after August

[9] 28 U.S.C. § 1505 (1970), based on § 24 of the Claims Commission Act, provides: "The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

13, 1946 (leaving to the Commission the damages suffered before that date).[10] The United States moved for judgment on the pleadings or for summary judgment on the grounds, among others, that the Commission had jurisdiction over the entire claims (including the post-August 1946 portion), that to permit maintenance of the action in this court would allow splitting of unitary causes of action, and that the suit here was in violation of 28 U.S.C. § 1500, which excludes jurisdiction in this court because of pendency of the claims in other courts.

In acting on the defendant's motions, the court discussed the problems at some length. Judge Littleton pointed out that our jurisdiction (under what is now 28 U.S.C. § 1505) would reflect whether the Commision had authority over "damages or compensation accruing subsequent to the passage of the Indian Claims Commission Act although the causes of action themselves may have accrued prior to that date." 135 Ct. Cl. at 185, 140 F. Supp. at 778.

The opinion did not purport to give a definitive answer,[11] but the discussion wholly favored the Com-

[10] Among those claims was one for allegedly illegal but regular assessment of operation and maintenance charges collected by the defendant for delivery of waters of the Gila River to the Indians. That same claim, as filed in the Commission, is now before us in Appeal No. 4-76. For the other pertinent claims of the Gila River Indians in this court *see* note 13 *infra*.

[11] The court thought it best "to refrain from passing on such issues at this time, thus leaving the Commission free to determine in the first instance the questions raised, including the scope of its own jurisdiction raised with respect to such

mission's authority in such circumstances. The court observed that "A claim arising prior to such date [August 13, 1946] would not seem to be cut off where it is a continuing one" 135 Ct. Cl. at 185, 140 F. Supp. at 778, and that while the Indians' petition in this court was limited to damages or compensation accruing subsequent to August 13, 1946, their petition in the Commission "on the same claims does not contain such a limitation and we find no such limitation in the statute." 135 Ct. Cl. at 186, 140 F. Supp. at 779.

Most significantly, the court, specifically adverting to the division of jurisdiction between the Commission and this court with respect to claims accruing before and after August 13, 1946, "illustrated" the "problems resulting from this arrangement" "as follows":

> Where a tribe is suing on a claim involving the recovery of periodic installments of compensation such as rent under a lease, and several of the installments fell due and were unpaid prior to the passage of the Indian Claims Commission Act while others fell due and were unpaid subsequent to that date, the question arises as to whether or not, on a claim therefor filed in the Commission, that body has authority to render judgment for all such installments of unpaid rent up to the

claims subseqeunt to August 13, 1946." 135 Ct. Cl. 180, 187, 140 F. Supp. 776, 779 (1956). Because of this cautious approach, the court denied defendant's motion without prejudice and suspended further proceedings in this court pending the outcome of the Indians' suit before the Commission and any appeals therefrom. 135 Ct. Cl. at 190, 140 F. Supp. at 781.

> date of its final judgment, or whether its jurisdiction is or should be held to be cut off and limited to rendering judgment for only those installments due prior to August 13, 1946, so that suit for the remaining installments must be brought in the Court of Claims. There is no express provision in the Indian Claims Commission Act one way or the other on this point, nor in the legislative history of the act insofar as we have been able to determine. It is the usual rule that a court once having obtained jurisdiction of the persons and subject matter of a suit, retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment. This is a good rule and we find nothing that would prevent its application here. [135 Ct. Cl. at 186, 140 F. Supp. at 779.]

Six years later, after a further oral argument triggered by a rule to show cause why the suit in this court by the Gila River Pima-Maricopa Indian Community should not be dismissed, the court dismissed the suit by order, noting its conclusion "that the allegedly wrongful acts of the defendant first accrued, if at all, prior to 1946, and it is held that the Indian Claims Commission has jurisdiction to award just compensation for such acts, whether the full content thereof became apparent before or after 1946", and that "the Indian Claims Commission has jurisdiction of the controversies asserted in the petition filed in this court." [12] 157 Ct. Cl. 941-42 (1962).

[12] The order described the Indians' action before the Commission as "seeking recovery from the defendant herein for

We think that the only acceptable way to read these *Gila River* decisions in 1956 and 1962 is as a holding by this court that, if a wrongful course of governmental conduct began before August 13, 1946 and continued thereafter, the Commission could properly take account of and award relief for the damages or injuries suffered after that date from the continuing course of conduct which began prior to that time. In view of the nature of the claims discussed in 135 Ct. Cl. and dismissed in 157 Ct. Cl., that is the only permissible reading.[13] That was how

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allegedly wrongful acts of the defendant which took place prior to the passage of the Indian Claims Commission Act on August 13, 1946, and are alleged to have continued thereafter," and then described the Indians' suit in this court as claiming "for all losses sustained by them since 1946 as a result of said allegedly wrongful acts." 157 Ct. Cl. 941-42 (1962).

[13] The dismissed *Gila River* claims in this court included: (1) failure and refusal of the Government to deliver to the plaintiffs the natural flow and the stored waters of the Gila River and also for the alleged failure of the defendant to stop various non-Indian users from diverting to their uses the waters of the Gila River and its tributaries; (2) illegal assessment of operation and maintenance charges for delivery of waters of the Gila River to plaintiffs (*i.e.*, the claim in Appeal No. 4-76); (3) failure of the defendant to protect and secure the Indians in their immemorial rights to the waters of the Salt River; (4) alleged breaches by the Government in connection with the leasing of parts of the Indians' reservation lands to the War Relocation Authority during World War II; and (5) a demand for an accounting from the Government. 135 Ct. Cl. 180, 182-84; 140 F.Supp. 776, 777-78 (1956).

None of these *Gila River* claims was for a constitutional taking in which the taking wholly occurred before August 13, 1946 and part of the damages became apparent only after-

this court understood and reaffirmed the holding in *United States* v. *Southern Ute Tribe*, 191 Ct. Cl. 1, 30-31, 423 F.2d 346, 362-63 (1970), *rev'd on other grounds*, 402 U.S. 159 (1971).

If we adhere to the *Gila River-Southern Ute* position, we would be required to reject the defendant's overall position in the cases now before us. That contention is, first, that each particular misuse of tribal funds or property or failure to act properly, gives rise to a separate claim; second, that each such separate claim arising after August 13, 1946, can be vindicated only by timely suit in this court under 28 U.S.C. § 1505; and, third, that the Commission has no jurisdiction over those expenditures, incidents, or failures occurring after August 13, 1946, even though they result from a course of conduct or policy begun before that cut-off day and continuing thereafter.

III.

Defendant does ask us to depart from our *Gila River-Southern Ute* stance; we are told that those rulings fly in the face of the statutory command and cannot be followed. Insisting that Congress confined the Commission's jurisdiction strictly to wrongs perpetrated on or before August 13, 1946, defendant invokes the general principles that Congress has the

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wards. That is how defendant describes *Colorado River Indian Tribes* v. *United States*, 156 Ct. Cl. 712 (1962), in which the court, two months before the *Gila River* order, dismissed those plaintiffs' suits because the Commission had full jurisdiction.

exclusive right to determine the jurisdiction of federal tribunals and that consents to sue the United States must be strictly construed. We have considered the matter afresh and conclude, first, that the *Gila River-Southern Ute* position is probably correct and, at the very least, tenable and supportable; and, second, that there is no strong or compelling reason to reject it at this time—rather, the opposite. In this Part III of our opinion we discuss the first of these propositions; we probe the second in Part IV.

Consider first the words of the relevant portions of the Indian Claims Commission Act. Section 2, 25 U.S.C. § 70a (1976), bars the Commission from entertaining any "claim" "accruing" after August 13, 1946. Section 12, 25 U.S.C. § 70k (1976), directs the Commission to receive "claims" for five years after August 13, 1946, and declares that no "claim" "existing" [14] before that date can be considered by any court or administrative agency, or by Congress. Section 24, now 28 U.S.C. § 1505 (1970), gave this court jurisdiction of any "claim" "accruing" after August 13, 1946. In each of these instances the words "claim" and "accruing" were left undefined in the statute. Our *Gila River* rulings took "claim" in those related contexts as broad enough to cover a challenge to a continuing and general course of conduct injurious to the Indian claimant, and not as necessarily restricted to the particular transactions or omissions, one by one. Similarly, "accrued," as related to such

[14] Here the word is "existing," not "accrued."

a general "claim," was taken to mean the time when the course of conduct was first ripe enough for suit in the Commission even though all the damaging transactions or incidents would not themselves occur for some years.[15]

This interpretation does not cross the literal words of the statute, or any entrenched principle necessarily incorporated into the legal meaning of those terms. Rather, "claim" and "accrual" of a claim are apt candidates for Justice Holmes' aphorism in *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918).[16] There is no compulsion that they be given exactly the same content here as in the "continuing claim" doctrine which has proved useful in applying this court's six-year statute of limitations to backpay and patent cases.[17] Among the considerations entering into the use of that type of "continuing claim" principle for this court's six-

[15] In its opinion in 135 Ct. Cl. 180 (1956), the *Gila River* court expressly distinguished between "accrual" of the claim itself and "accrual" of the damages arising from that claim. *See* 135 Ct. Cl. at 185, 186, 140 F. Supp. at 778, 779.

[16] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to circumstances and the time in which it is used."

[17] *See, e.g., Burich* v. *United States*, 177 Ct. Cl. 139, 143, 366 F.2d 984, 986 (1966), *cert. denied*, 389 U.S. 885 (1967); *Calhoun* v. *United States*, 173 Ct. Cl. 893, 354 F.2d 337 (1965); *Lerner* v. *United States*, 168 Ct. Cl. 247, 252-53 (1964); *Russell* v. *United States*, 161 Ct. Cl. 183, 186, 314 F.2d 809, 811 (1963); *Friedman* v. *United States*, 159 Ct. Cl. 1, 6-8, 310 F.2d 381, 384-85 (1962), *cert. denied sub nom. Lipp* v. *United States*, 373 U.S. 932 (1963).

year limitations period are (1) the feeling that it would be somewhat unfair to plaintiffs to bar them forever—no matter how long the wrongful deprivation continued—if they did not bring suit within six years of the first administrative refusal or failure to pay the amount claimed or the enactment of the statute giving rise to the claim, and (2) the difficulty and speculation (especially in patent cases) of determining, in the beginning and all at once if suit had to be brought within the first six years, the amount of recovery for the future (a patent lasts for 17 years) as well as the past, *see Calhoun* v. *United States*, 173 Ct. Cl. 893, 896, 354 F.2d 337, 338 (1965). Those factors do not enter into Claims Commission cases, with statutory coverage of all claims accrued on or before August 13, 1946, no matter how far back they go. Once suit is timely filed, the plaintiff is fully in court for all past damages, and there need be no difficulty or unfairness in assessing damages for wrongs of the same type continuing while the suit is pending; indeed, as the *Gila River* opinion pointed out, that is the normal rule for timely-filed proceedings. 135 Ct. Cl. at 186, 140 F.Supp. at 779; *see also Calhoun* v. *United States*, 173 Ct. Cl. 893, 896-99, 354 F.2d 337, 338-40 (1965).

On this view, the Commission could properly entertain, without transgressing any provision of the Claims Commission Act, a petition timely filed on or before August 13, 1951 (five years after August 13, 1946), which expressly stated as its claim, let us say, that the Federal Government had followed since 1940

the wrongful course of conduct and general policy of using tribal funds to pay for purely Indian agency governmental needs, and such a general claim would entitle the Indian claimant to redress for such wrongful expenditures not only up to August 13, 1946, but also beyond that date until judgment.[18] The clear objective of the Claims Commission Act to "clean up", once and for all, past wrongs going far back in our history (without regard to limitations or laches)—*see Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 487 (1966)—supports such a broad understanding of "claim" and "accrual" of a claim for Commission purposes. It is also sustained by the significant practical considerations we outline *infra*.

Refusing to accept this solution, defendant says that Congress, in the Claims Commission Act, sharply separated the Commission's jurisdiction from this court's original jurisdiction by the date of enactment (August 13, 1946), and that adherence to the canon of strict construction of waivers of sovereign immunity requires us rigidly to heed that very distinct, razoredged, cleavage. But we have already reiterated that no insuperable obstacle, linguistic or theoretical, bars definition of a "claim," for Commission purposes, as including a continuing federal policy or course of conduct; similarly, "accuring," with respect

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[18] *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966), recognized at 487-89, 491, that the Commission had equitable authority to compel a general up-to-date accounting. A general claim for redress of a continuous course of wrongdoing is close kin to such a general accounting.

to a "claim," can mean in this context the initiation or commencement of such a continuing policy or course of conduct (regardless of the dates of impact of the series of individual transactions or omissions which make up that "claim").

As for the canon of strict construction, we doubt that it has its full force where, as here, Congress has waived immunity, not partially (as is most often the case), but almost wholly—distinguishing only by date between the two federal tribunals selected to hear those cases as to which immunity has been set aside. Normally, a waiver is read strictly so as not to catapult courts, or particular kinds of courts, into matters or relief which Congress did not wish to repose at all in the judicial branch or in certain tribunals. *Cf. McElrath* v. *United States*, 102 U.S. 426, 440 (1880); *United States* v. *Testan*, 424 U.S. 392, 399-404 (1976). Here, there is little reason to think that the 1946 Congress had any such aim. For the types of claims with which we deal in the present cases, there is little difference in authority between the Commission and this court acting under 28 U.S.C. § 1505.[19]

[19] This court does not have "fair and honorable dealings" jurisdiction under 28 U.S.C. § 1505, but the claims we are considering arise under other heads of jurisdiction, especially subdivisions (1) and (2) of Section 2, 25 U.S.C. § 70a (1976). Though *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966), holds that we have no general equitable jurisdiction under § 1505 and cannot order an accounting as such, that opinion also rules that this court has power, after individual wrongs have been proved, to order an accounting in order to determine the proper monetary relief. 174 Ct. Cl. at 490-92.

Defendant admits that when it says that the Commission has jurisdiction over these wrongs consummated on or before August 13, 1946, and argues that suit should have been brought in this court for the very same type of wrongs consummated thereafter.

It is true that the Commission was to be a temporary tribunal and Congress did not expect its life to be prolonged indefinitely. But Congress also knew that it would have at least a decade of life,[20] that petitions could be filed at any time up to August 13, 1951, and therefore that post-August 1946 wrongs, connected with pre-August 1946 events, could very well occur both before and while proceedings were pending in the Commission. It is difficult to believe that Congress would *insist* that two sets of proceedings had to be carried on simultaneously, one in the Commission on pre-August 1946 wrongs and the other in this court on the very same category of injuries (stemming from the same general policy or course of conduct) which happened to be perpetrated after that time. The principles which underlie the strict construction of statutory waivers of sovereign immunity simply do not have full strength in the precise situation before us.

But even if we were to apply the principle of strict construction at full face value, we would not adopt the Government's thesis. It has never been the rule that consents-to-suit must be given the narrow-

[20] Section 23 of the original Act, ch. 959, 60 Stat. 1055 (1946), provided a ten-year life for the Commission if it had not finished its work earlier.

est possible scope [21] or that legislation granting jurisdiction of actions against the sovereign must be read apart from history, legislative purpose, or the dictates of commonsense. *Cf. Amell* v. *United States*, 384 U.S. 158 (1966). Given a fair though not expansive reading, the Claims Commission Act authorizes Commission jurisdiction over these continuing claims with roots laid prior to August 1946. Otherwise the probabilities were—even when the statute was enacted in 1946—that a substantial number of wrongs would never be redressed at all. In many instances the Indians could not file claims with any tribunal until they learned from the Government what it had done with Indian funds and property. These accountings by the defendant would necessarily take time [22] and the Indians then had to have some period in which to evaluate the materials and figures supplied to them. That is one reason why claimants were given five years in which to petition the Commission on pre-August 1946 claims. 25 U.S.C. § 70k (1976).[23] Meanwhile, of course, our six-year statute of limita-

[21] If that were the rule, this court would not have been held competent to call on equitable concepts like reformation and rescission for help in determining monetary claims against the Government. *See United States* v. *Milliken Imprinting Co.*, 202 U.S. 168, 173-74 (1906); *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966).

[22] In fact, they took a very long period of time. The Navajo accounting was first filed in 1961. *See also* Part IV, *infra*.

[23] There also are statutory provisions for investigations by the Commission and for calls upon the Government for information. 25 U.S.C. §§ 70l, 70m (1976).

tions would be continuously running on claims which could be filed in this court (under defendant's theory) very shortly after August 13, 1946. The inevitable result would be that some claims, arising after August 13, 1946 under defendant's position, would be timebarred before the Indians were in any position to bring suit here, and perhaps even before they were aware of the wrongful transactions or omissions. Yet if one thing is clear it is that Congress expected all Indian claims, past and future, of those "legal" types (*i.e.*, more than purely moral) covered in the statute to have a timely day either in the Commission or in this court. There was to be no gap or hiatus for the Indian claimant. The *Gila River* interpretation makes that possible. In addition, as we have already suggested, that reading avoids concurrent litigation in two fora on the very same issues, as well as preventing the splitting of causes of action which the defendant protested when it asked the court to dismiss the protective petition which the Gila River Pima-Maricopa Indian Community had filed here as insurance against the very construction which the defendant now so urgently demands. *See also* Part IV, *infra*.

Finally, we address directly the problem—a hypothetical question in view of the way *Gila River* was decided—whether it would have run counter to the Claims Commission Act if the court had accepted jurisdiction in *Gila River*. Defendant urges that there is not a particle of concurrent jurisdiction between this court's authority under 28 U.S.C. § 1505

and the Commission's authority, and therefore that jurisdiction here over these post-1946 transactions would necessarily mean that the Commission could not consider them at all. We are not so certain of this sharp dichotomy of mutual exclusivity. Because the Commission had full-scale equitable jurisdiction, *see Klamath and Modoc Tribe* v. *United States*, 174 Ct. Cl. 483, 487-89, 491 (1966), it is possible in that light to construe the terms "claim" and "accruing" for Commission purposes more broadly than the same terms as used in § 1505 for this court's more limited jurisdiction; the broader construction could encompass "course-of-wrongful-conduct" or "continuing wrongful policy" claims which originated before August 14, 1946, while this court would be confined to the separate transactions or omissions actually occurring after August 13, 1946.[24] It is not unknown for a federal statute which seems on its face to declare a sharp-edged dichotomy to be read as permitting a certain amount of overlap.[25]

[24] 28 U.S.C. § 1500 (1970) could bar a claimant from filing both a "course-of-conduct" or "continuing policy" claim in the Commission (if the claim reached beyond August 13, 1946) and a parallel post-August 1946 suit in this court on the separate "wrongs", but under the suggested analysis the claimant could use either option without running afoul of § 1500.

[25] The Supreme Court faced a roughly comparable problem of division of jurisdiction—in that instance, between federal and state systems—under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970). That statute authorized payments under it only for injuries occurring on navigable waters *and* if recovery could not validly be provided under the Constitution by state law (according to the so-called *Jensen* doctrine). It proved extraordinarily difficult to determine which particular injuries could validly be covered under state law and many workmen chose either a state or the federal route without being sure whether or not a court or tribunal would ultimately decide that the system selected by that employee could lawfully cover his injury—under the Constitution as interpreted by *Jensen* (in the case of state systems) or under the federal Act (for those choosing the federal path). Because of these great difficulties and in order to protect employees against the hazards of opting for the "wrong" path, the Supreme Court developed a "twilight zone" theory under which, if there were substantial support for choosing either route, a decision by either system would be upheld. *Davis* v. *Department of Labor*, 317 U.S. 249 (1942); *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959); *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962). In reaching this conclusion, the Court construed the words of the Longshoremen's Act in the light of its overall aims and of practicalities.

In any case—even if we assume that there can be no smidgen of overlap—we conclude, for the reasons already given, that defendant's position, assessed *de novo*, is not more meritorious in "pure" theory than the *Gila River* rule, and that in the area of practical operation the Government's Procrustean vise would probably prove to be inferior.

The heart of what we have been saying in this Part III is that, on reexamination, we cannot reject the *Gila River* rule as incorrect, untenable, or unsupportable. On the contrary, it seems to us appropriate, well-supported, consonant with the language and objectives of the Claims Commission Act, and sustained by practical considerations and needs.

IV.

There are additional reasons why we consider it a mistake to overturn *Gila River* at this stage of litigation under the Claims Commission Act.

A. Chief among these is the unfairness of now departing from a substantial position which this court adopted, many years ago, at the behest of the defendant and which has been accepted since that time by the Indian claims community as a clear signal that the Commission had jurisdiction over these "continuing" claims and that protective actions need not be filed in this court under 28 U.S.C. § 1505.

When this court considered, in 1956, the Government's motion in *Gila River* for judgment on the pleadings or for summary judgment, the court had before it a written brief by the defendant which urged that several of the claims made in the *Gila River* court petition should be dismissed as identical to claims already on file with the Commission; the brief urged dismissal under 28 U.S.C. § 1500 and also on the ground that, because the two sets of claims were the same, the post-August 13, 1946 claims which those plaintiffs attempted to assert here split a single cause of action. In reply, the plaintiff Indians contended that the two sets of claims were separate because of the difference in the time when they arose. The court's opinion is summarized in Part II, *supra;* it obviously leaned heavily toward the position advanced by the defendant. When the court later issued in 1962 its rule to show cause why the *Gila River* petition should not be dismissed, the defendant filed

no written response but it can safely be assumed that it did not oppose the dismissal which ensued.[26]

The *Gila River* decisions of the court, considered together, were obviously taken by Indian claimants and their counsel as a holding that the Commission could redress these so-called continuing wrongs both before and after August 13, 1946, and that protective suits need not be filed here. Sixteen years have passed since the dismissal order of 1962. So far as we are aware, no such protective suits in this court, similar to that of the Gila River Indians, have been brought or prosecuted since that date.[27] If we were now to reverse our direction, limitations would have run on a very large segment of the types of continuing claims we address in this opinion. Opportunity to obtain relief would thus be denied in both of the tribunals available to the Indians under the Claims Commission Act.

In addition, defendant did not conduct its proceedings before the Commission so as timely to alert the Indian claims community that it had altered its views so as to adopt a position of denial of any Commission jurisdiction over continuing wrong perpetrated after

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[26] There is no transcript or recording of the oral argument which was had at that time. The Indians' brief written response opposed dismissal and sought a further suspension of proceedings.

[27] In *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966), the claims arose wholly out of the termination of federal supervision over the Klamath Indians which occurred in and after 1954, and had no roots prior to August 13, 1946.

August 13, 1946. For example, in the *Navajo Tribe* case now before us, the Government furnished a General Accounting Office report of receipts and disbursements of Indian funds going up to June 30, 1951 (almost five years after August 13, 1946); the same is true in the *Nez Perce* case, the other proceeding specifically considered in this opinion. In *Nez Perce*, too, the defendant entered into a stipulation of settlement of all claims up to June 30, 1951. We gather that it was not until the second half of the 1960's or the beginning of the 1970's that the different position, now advocated so strongly, emerged in such form as truly to warn the Indian claims bar that the United States had definitely changed its footing. By that time, of course, it was too late to sue in this court on a great many of the post-1946 incidents or transactions.[28] A separate problem was the slowness of the Government in supplying accounting reports so that claimants could adequately tell whether or not they had continuing-type claims. *See* S. REP. No. 92-682, 92d Cong., 2d Sess. 3-5 (1972). Though the defendant need not be faulted for this delay, the resulting passage of time must be a factor in evaluating the propriety of overturning *Gila River* at this late date.

[28] There is no question of any deliberate entrapment. We assume that, until relatively recently, the Government did not appreciate the extent of the post-1946 accounting which would be required under the *Gila River* decisions and that the problem was more substantial than it was earlier thought to be. The length of time it has taken to complete Commission cases has, no doubt, enhanced the Government's concern.

B. Initially the Commission, when it first addressed the matter, decided that the United States should furnish full up-to-date accountings of its management of Indian funds and property without any preliminary showing of some pre-August 1946 wrong. *See Southern Utes* v. *United States*, 17 Ind. Cl. Comm. 28, 63, 65 (1966), *aff'd*, 191 Ct. Cl. 1, 423 F2d 346 (1970), *rev'd on other grounds*, 402 U.S. 159 (1971); *Te-Moak Bands* v. *United States*, 23 Ind. Cl. Comm. 70, 72 (1970); *Mescalero Apache Tribe* v. *United States*, 23 Ind. Cl. Comm. 181, 185-86 (1970). Somewhat later, the Commission modified its stand to comport more directly with *Gila River* and to require some showing of pre-August 1946 wrongdoing which continued thereafter. *See, e.g., Fort Peck Indians* v. *United States*, 28 Ind. Cl. Comm. 171, 174-75 (1972); *Blackfeet and Gros Ventre Tribes* v. *United States*, 32 Ind. Cl. Comm. 65, 71-76 (1973); *Fort Peck Indians* v. *United States*, 35 Ind. Cl. Comm.24, 28-29 (1974), *rev'd & remanded on other grounds*, 207 Ct. Cl. 1045 (1975). Plaintiffs ask us to go beyond *Gila River* and reinstate the earlier and broader Commission view.

There is, we agree, substantial support for this theorem since a petition for an accounting from pre-August 1946 forward can, in and of itself,[29] be considered an independent claim accruing as a whole prior to August 13, 1946. *See Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 487-89, 491 (1966); *Blackfoot and Gros Ventre Tribes* v. *United*

[29] *I.e.*, without any preliminary or prior proof of mismanagement or wrongdoing.

States, 32 Ind. Cl. Comm. 65, 74 (1973). However, both decisions of this court in *Gila River* rest on the narrower ground requiring a showing of a continuous course of wrongful conduct[30] and that has been the prevailing rule for several years. Indian Claims Commission litigation is supposed to be currently on the downhill path. Just as it would be unfair to claimants to abolish the *Gila River* rule in the wholesale manner defendant suggests, so would it unfairly prejudice the defendant to broaden post-1946 coverage, at this late stage, as plaintiffs seek. We add that the straight accounting theory, though it has some appeal, is not demonstrably superior, if better at all, than the *Gila River* analysis discussed in Parts II and III, *supra*.

V.

We come finally to the disposition of the particular cases before us.

A. In *The Navajo Tribe*, the only motion is that of the defendant for partial summary judgment; plaintiff has made no motion. The Government's motion is primarily based on its overall contention that there is no Commission jurisdiction on the basis of a "continuing wrong." For the reasons set forth in

[30] In affirming the Commission's decision on this point in *Southern Ute*, the court rested squarely on *Gila River* and held that "the Commission correctly ordered an up-to-date accounting for continuing Government wrongdoings which predated and postdated the statutory time bar." 191 Ct. Cl. 1, 31, 423 F.2d 346, 363 (1970), *rev'd on other grounds*. 402 U.S. 159 (1971).

Parts II-IV, *supra*, that aspect of the motion is denied.

The motion also urges, alternatively, that even if there is Commission jursidiction over "continuing wrongs," that principle does not cover the miscellaneous agency expenses or the IIM accounts involved here. On the miscellaneous agency expenses, the Commission has already decided (with one dissent) that it had jurisdiction to consider such post-August 1946 disbursements as "continuing wrongs." 39 Ind. Cl. Comm. 252 (1976). Defendant says that that decision is unsupported by any adequate showing. Since the Navajo Tribe has raised (by affidavits and documents) at least a triable issue of fact as to the existence of a continuing wrongful policy of the part of the Government to disburse Indian monies so as to defray its own expenses, the defendant's motion will be denied without prejudice as to the miscellaneous agency expenses.[31] The Commission's decision on those expenses will remain standing until a further proceeding shows that it should be vacated, overturned, or modified.

As for the IIM accounts, there has been no final Commission determination. Defendant says that several of those accounts were not in existence or had any activity before August 14, 1946, and therefore as a matter of law there can be no "continuing" jurisdiction as to those accounts. If, however, any

[31] As already noted, plaintiff has not made any motion of its own for summary judgment and urges only that the defendant's motion be denied.

substantial monies in those accounts were received from other accounts preexisting the cut-off date, it would seem that the *Gila River* doctrine could apply (if pre-August 1946 wrongs were shown) and defendant could be ordered to account for those accounts. There may also be other grounds for applying "continuing" jurisdiction, such as that the post-August 1946 IIM accounts were used to defray governmental expenses.[32] Defendant's motion is therefore denied without prejudice as to the IIM accounts.

B. *The Nez Perce Tribe*: Here, too, defendant's dominant position has been rejected and that part of its cross-motion must be denied outright. Plaintiff has moved for partial summary judgment on certain of its claims (defraying governmental expenses from tribal funds; "reverse spending"; failure to make tribal funds productive) and asks for a trial on the others. *See* note 8 *supra*. Defendant tells us, in response, that even on the *Gila River* principle there has not been a sufficient showing on the three claims for which plaintiff seeks judgment at this time. The factual presentation to the court from both sides on these specific aspects of the case has been

[32] By way of perhaps unnecessary caution, we note that, for example, a wrongful course of conduct in using Indian monies to defray governmental expenses could affect various accounts or classifications, and would not necessarily be limited to one particular classification, *e.g.*, "miscellaneous agency expenses." It would be the general misuse of Indian monies for federal purposes which would be the wrongful course of conduct (whatever the particular monies used); there would not be separate wrongful courses of conduct for each tribal fund used for such ends.

too thin and unexplained for us to decide securely, and the appropriate course is to deny both motions without prejudice[33] and remand to the Trial Division for further proceedings. On the general question, plaintiff's motion is of course granted.

Accordingly, the motions before us are denied and granted as prescribed in this Part V of the opinion.[34] In particular, defendants' motions are denied with prejudice insofar as they assert that there can be no "continuing" wrongs occurring after August 13, 1946 over which the Commission (and this court on transfer) has jurisdiction; otherwise defendants' motions are denied without prejudice, as is the motion of the Nez Perce Tribe of Idaho asking for judgment on

[33] Of course, as stated above we deny with prejudice the defendant's attack on the general *Gila River* doctrine. Moreover, we reject outright any suggestion that the compromise settlement of all wrongs up to June 30, 1951, makes it impossible to inquire into pre-August 13, 1946 transactions for the purpose of determining whether the Tribe is now asserting continuing post-June 1951 wrongs which had their origin and seed before August 13, 1946. The settlement, which contains a clear and explicit reservation of all claims from and after July 1, 1951, does not preclude plaintiff from raising such post-1951 wrongs.

[34] In determining whether any post-August 1946 transaction, incident, or omission is part of a continuing course of conduct or policy antedating August 14, 1946, the Trial Division can look, of course, to the many particular decisions of the Commission on that general question, but we take no position on any of the Commission's specific results and do not, in this case, either approve or reject any of those specific holdings. We do, of course, accept the general principle of "continuing" wrongs.

specified claims. On the general issue of Commission jurisdiction over "continuing" wrongs occurring after June 30, 1951, the motion of the Nez Perce Tribe is granted.

NICHOLS, *Judge*, concurring and dissenting:

I agree to this: if the Indian tribal claimant, in a Claims Commission Act proceeding, 25 U.S.C. § 70a, establishes the wrongful invasion of any Indian account in government control, before the cut-off date of August 13, 1946, it has become entitled to a proceeding in equity in which the subsequent management of the fund must be accounted for, any division of the moneys into other accounts traced, and any wrongs made good, down to the date of final adjudication, whenever that may be. I base this right on the nature of an accounting as held in *Klamath* and *Modoc Tribes* v. *United States*, 175 Ct. Cl. 483 (1966). The right to this "accrued" before August 13, 1946, if the first wrong preceded that date, but if it occurred later, there was no timely accrual and no jurisdiction to accord that type of relief.

What, respectfully, I cannot accept, is what the opinion seems to say: that the establishment of a bad precedent, before August 13, 1946, "accrues" a claim for any wrong following that precedent that occurs thereafter. Thus, to give a concrete illustration, if the government wrongly uses Indian funds to provide an electric range for the resident agent's quarters, before the magic date, it is also liable if it

wrongly uses other Indian funds to provide a copying machine for the agent's office, after that date, without regard to the identity of the accounts invaded. I suppose the nexus is that the aggrieved tribe is the same, and the defendant's claim of right is similar to the extent that the earlier diversion might be cited as a precedent for the later one. As I view the situation, the right to accounting pertains to accounts. My formulation would do better for the Indians than the court's, in some situations, worse in others. Maybe most of the time we would reach the same result. Perhaps I misunderstand what the court means in attaching the consequences it does to a "wrongful course of government conduct," but I think a lot of others will too.

I'm not convinced that this court intended in the opinion in *Gila River Pima-Maricopa Indians* v. *United States*, 135 Ct. Cl. 180, 140 F.Supp. 776 (1956), to announce views in conflict with mine. The problem the court addressed there was "wrongs" before August 13, 1946, with "damages" after. P. 185. The portion of the claims of that tribe that is before us now, Appeal No. 4-76, involves an alleged wrongful assessment of Indians for irrigation water they believed themselves entitled to receive without charge. I am prepared to believe that the Secretary's regulations, before August 13, 1946, denying such entitlement "accrued" all at once a claim for recovery of all moneys exacted from the Indians for water both before and after that date. This does not require the "intuitive leap" that the electric range copying ma-

chine situation I have postulated does. I do not think any of the claims in that case did. Our decision on their War Relocation claims, 199 Ct. Cl. 586, 467 F.2d 1351 (1972), reveals no problem of wrongs after August 13, 1946.

The court in the volume 135 case quite obviously used the words "continuing claim" when it meant the opposite. The phrase, as used in the cases cited in Judge Davis' f.n. 17, means a claim that does not accrue all at once. It accrues by degrees, whenever a new money payment becomes due. But the court obviously meant by "continuing claim" in the *Gila River* case one that did accrue all at once, the result obviously, of a single "wrong." This was in my view a mere verbal inadvertence that does not require overruling the decision as a precedent, but it should induce hesitation in using its language beyond the facts then before the court.

An Indian claim that accrued only after August 13, 1946, may be now unenforceable in any tribunal. In general the statutory scheme under the present 28 U.S.C. § 1505 appears to be that if the claim accrued only after August 13, 1946, the tribal claimant must come under the regular jurisdictional categories of section 1491, with the single addition of claims founded on treaties. This excludes "fair and honorable dealings" claims, other moral claims, if any, and equitable accounting claims as held in *Klamath and Modoc Tribe, supra*. The court seems to say in dictum that this does not exclude very much, but that remains to be determined. It will be the issue,

e.g., in *Mitchell* v. *United States*, Nos. 772-71 through 775-71, now pending, and no doubt in many other cases. Congress clearly intended a difference of substance to turn on whether the claim accrued before or after August 13, 1946.

It is unfortunate if either the court or the defendant has misled Indian claimants, and undoubtedly, the distinctions that must be drawn do not impress the mind as just ones. I surmise that Congress in 1946 supposed injustices to Indians to be matters of history, so that there was no need for the future for tribes to have any different standing than other Tucker Act claimants. That we have so many allegations of wrong courses of conduct, whether "continuing claims" or not, passing to and through the deadline dates, presents an unforeseen problem, and to put it bluntly, a mess.

The Supreme Court's "snail darter" decision, *Tennessee Valley Authority* v. *Hill*, 46 U.S.L.W. 4673 (June 15, 1978), appears, among other significant aspects, to announce an end to the practice of trying to "fix up" defective legislation by judicial decision. Absent constitutional factors not here involved, it is the duty of Congress and Congress alone to correct its own errors. Here, initial congressional misconceptions have consequences exacerbated by misunderstandings and changes in the government's position. Legislation is needed, but legislation by judges can only make a bad situation worse.

In pursuit of its laudable aims, the majority glosses entirely too lightly over the doctrine of strict con-

struction of the consent to be sued. The truth is that the original Tucker Act, 25 Stat. 505, Act of March 3, 1887, consented to suits in respect of claims against the United States when the party would be entitled to redress, if the United States were suable, in "equity or admiralty." *United States* v. *Jones*, 131 U.S. 1 (1889) largely eliminated this so far as equity was concerned, holding that a suit for specific performance was not consented to. Thus the cases as to reformation and recission of contracts, referred to in the court's f.n. 21 merely preserved remnants of a grant of equity jurisdiction which, by the statutory language alone, was seemingly much broader. They do not prove the consent to be sued is not construed trictly. Similarly, the grant of admiralty jurisdiction went by the board in *Matson Navigation Co.* v. *United States*, 384 U.S. 352 (1932). This court now cites *Amell* v. *United States*, 384 U.S. 158 (1966), but that case must be regarded as somewhat of a sport. Mr. Justice Harlan's dissent is in its reasoning closer to the usual approach of his Court to consent to be sued issues. *United States* v. *Emery*, 237 U.S. 28 (1915), construed the original Tucker Act to allow tax refund suits, Mr. Justice Holmes saying at p. 32—

> * * * [It is an] inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye. * * *

But this cannot be taken as a safe guide to the law as it is today. The Congress deemed it necessary

to ratify the result in what is now 28 U.S.C. § 1346, stating that the jurisdiction of district courts is "concurrent" with that of the Court of Claims. The rule disfavoring repeals by implication does not apply to repeals by implication of consents to be sued in the Court of Claims; this is the necessary conclusion from the *Matson* decision, *supra*. The Congress later ratified the result of the *Matson* decision, as set forth in the dissent in *Amell*. I stated for this court in *Denver & Rio Grande Western R.R.* v. *United States*, 205 Ct. Cl. 597, 599, 505 F.2d 1266, 1267 (1974), that our jurisdiction in tax refund cases depended both on sections 1346 and 1491, which surprised some critics, but was clearly correct; the "concurrent" language was necessary to save our Tucker Act refund jurisdiction against the rule of strict construction of the consent to be sued, associated with loose construction of repeals by implication.

The rule of strict construction is very much alive in our time, as witness *United States* v. *King*, 395 U.S. 1 (1968); *United States* v. *Testan*, 424 U.S. 392 (1976); and *United States* v. *Hopkins*, 427 U.S. 123 (1976), all reversing decisions of this court on consent to be sued issues. I believe a fair construction of these and earlier cases is that to be suable, a claim must (a) come within the express literal language of a statutory consent to be sued, and (b) must also come within the general congressional scheme as judicially conceived. *Hopkins'* claim failed under the first test though it might have passed the second. To give equal rights to employees of certain

non-appropriated agencies, Congress extended the Tucker Act jurisdiction, but unfortunately said it extended to contracts of such agencies. Since most of their employees, like those of other parts of the government serve by appointment and not by contract, *held*, the extension did not apply to them. The claim in *United States* v. *Jones*, *supra*, failed on the second ground though it passed the first. That is, it was an equitable claim, and Congress in the original Tucker Act said this court should have jurisdiction of equitable claims, but the court just could not conceive, after careful analysis of the whole statutory scheme, that Congress intended this court to be telling executive branch officials what to do, as it would in a specific performance decree. The court below, it may be noted a circuit court under the concurrent jurisdiction, had applied the first test but not the second.

Now, it can hardly be denied that as said above, important limitations on the consent to suit were intended with respect to Indian claims that accrued after August 13, 1946. It appears at least superficially from 28 U.S.C. § 1505 that an Indian tribe can sue on a claim accruing after that date only if it is one of the classes or categories of claims founded on a treaty or on which individual Indians and individual non-Indians can sue, *i.e.*, a claim founded on the Constitution, etc. If the claim accrued before August 13, 1946, it was maintainable on much broader bases. 25 U.S.C. § 70a. The court hardly attempts to deny that there is that difference in the

congressional intent, but it seeks to mitigate and modify the difference by holding, *e.g.*, that a claim for misuse of Indian funds to buy a copying machine after August 13, 1946, accrued before August 13, 1946, if a precedent for such misuse occurred before that date. This seems to me to invite another reversal, though I agree that an accounting, properly so called, can follow a misused account through and after August 13, 1946, to the present time. By the *Klamath* decision, *supra*, the right to an accounting is equitable, not legal, and carries through so that the court can examine the fund in the hands of the accountable custodian as of the time of trial.

The court, in effect, says it can define "claim" any way it pleases, a concept more reminiscent of *Alice in Wonderland* than of Mr. Justice Holmes. In *Grumman Aerospace Corp.* v. *United States*, Ct. Cl. No. 544-76 (slip op., decided June 14, 1976), the court made a decision concerning the meaning of the word "claim" that I did not entirely understand, and dissented from in part, but it seems to say a "claim" is a controversy wherein the "claimant" is either resisting or prosecuting a present demand for money. The word "claim" is certainly one of varied meanings, as pointed out in that dissent. The most used and most restrictive definition is perhaps that in *United States* v. *McNinch*, 356 U.S. 595, 599 (1958), "a demand for money or some transfer of public property." In any context except that of legislation granting consent to be sued, it might well be, if

the context permitted, a "claim" might include a demand for redress for a wrong not yet committed. The difficulty here is, if that is the meaning, the whole object of Congress in distinguishing between claims accrued before and after August 13, 1946, is frustrated. Our *Gila River,* vol. 135 decision, did *not* hold that a "claim" was broad enough "to cover a challenge to a continuing course of conduct injurious to the Indian claimant." This subtly transfers the unhappily chosen word "continuing" as used therein, from the claim to the course of conduct. I do not believe there is any authority for so sweeping a use of the word "claim" but I do not deny it is possible if the context permits. Does the context permit?

With regard to the meaning of "accruing after August 13, 1946," the usual rule is that a claim first accrues when all the events to fix the liability of the United States have occurred. *Empire Institute of Tailoring, Inc.* v. *United States,* 142 Ct. Cl. 165, 161 F.Supp. 409 (1958). Can this be said of a wrong that has not yet occurred?

Is it conceivable that Congress intended post August 13, 1946, wrongs to come in under the broader consent of the Indian Claims Commission Act if the claimant is able to discover another wrong previous to August 13, 1946, that could be called a precedent? The court apparently thinks this is a desirable result, and no doubt it is, but it drastically modifies a carefully thought out consent to be sued. I do not think the rule of strict construction allows such a result to

be achieved by attaching unprecedented meanings to words in the consent statute that are common currently among lawyers in more restricted meanings.

I was, I now realize, when I joined this court most deficient in understanding of strict construction of the consent to be used. I have learned wisdom, not only by writing or participating in decisions that were reversed, but by my efforts towards reconstructing the history of this court. The generation of judges contemporary with the Tucker Act were most careful not to exceed the consents Congress had made, conservatively construed, of which history affords numerous examples. Most of the errors along that line, requiring reversal, were by circuit or district judges purporting to exercise their concurrent under $10,000 jurisdiction. They were presumably less aware of congressional intent in the Tucker Act. There is no more need now than then for our heads to be constantly bloodied in course of efforts to exercise jurisdiction we do not possess. Decisions to "fix up" defective legislation are particularly unfortunate when they deal with the consent to be sued. On the other hand, a corollary I think is that it is our duty to say so when we see a statute (including a consent to suit statute) as defectively drafted, rather than try to extol it as the summit of wisdom, Blackstone fashion. The court's opinion does a brilliant job along this latter line: no one can read it and not see that corrective legislation is urgently needed. We must have confidence in Congress. It is accessible to Indian claimants, and I think, if we construe the

involved consent to be sued as it was written, the plaints of any Indian claimant aggrieved thereby will be heard in Congress and better legislation will ensue.

APPENDIX B

GSA

GENERAL SERVICES ADMINISTRATION
OFFICE OF ADMINISTRATION
Washington, D.C. 20405

Nov. 7, 1978

Mr. A. Donald Mileur
Chief, Indian Claims Section
Land and Natural Resources Division
Department of Justice

Attention: Mr. Dean K. Dunsmore
Benjamin Franklin Station
P.O. Box 7415
Washington, D.C. 20044

Dear Mr. Mileur:

Re: Navajo Indians, Docket Nos. 69, 299, and 353 (Accounting Claims) vs. the United States, before the U.S. Court of Claims

Recently, we met with Mr. Dunsmore to discuss the Court of Claims' decision relating to the possibility of a post 1946 accounting of Navajo tribal funds. Mr. Dunsmore requested that we provide him with an estimate of the manpower resources that would be needed to produce an accounting report for the period September 1, 1946 to October 31, 1980.

We estimate that to do an accounting of all Navajo tribal receipts, property and disbursements would take about 100 man-years. An explanation of some

of the factors involved in arriving at this estimate follows:

1. To date we have expended close to 50 man-years, (and still counting) to supplement Navajo accounting reports for the period prior to August 13, 1946. This does not include work on Navajo treaty funds, lands, or gratuities.
2. Our pre-1946 supplemental accounting was accomplished by utilizing the fiscal officers' accounts conveniently located at Suitland, Maryland. Also, many of the auxiliary records used to support receipts and disbursements for the pre-1946 period are located at Suitland and at the National Archives. The GAO worked on this case for over ten years, and the record they left was invaluable to us in our efforts. However, beginning in FY 1951, agencies were no longer required to submit fiscal accounts for audit to the General Acounting Office. Fiscal accounts as well as auxiliary records were kept "on-site" for possible audits in accordance with the Budget and Accounting Act of 1950. As a result, BIA fiscal records for 1951 to present are located in various Federal Records Centers and at the Albuquerque Finance Center. Auxiliary records may be found at these same locations as well as at various BIA Area and Agency offices. The scattered record locations, and lack of an existing guide into the needed records can be assumed to add substantially

to the time necessary for completion of the reports.

3. Our experience with post-'51 BIA records indicates that the BIA's records management system has been somewhat ineffective in monitoring the transfer of Area and Agency files to Federal Records Centers for proper storage. Also the identification of boxed records has been inadequate requiring lengthy searches of boxes to identify the contents.
4. Up to this point, our experience has been primarily with manually-posted accounting records. A singular feature of this type of system is the amount of detailed documentation associated with each transaction. An ADP system on the other hand relies on minimizing detail posting to the greatest extent possible for its efficiency. As a result, the detailed documentation necessary to support an accounting report becomes more difficult to locate. Also, the pre-1966 disbursement documents were batched together by tribe. Under a centralized ADP system, disbursement documents are randomly batched without regard to tribe, and consequently more difficult to locate.
5. It appears that activities on the Navajo Reservation have substantially increased since 1946. The quantum increase in leasing activity relating to oil, gas, and coal, and the number of rights-of-way granted will require a substan-

tial period of time to document. As to tribal IIM accounts, the pre-1946 IIM accounting covered a period of 10 years. The post 1946 IIM accounting will cover a period of over 30 years with the obvious necessity for additional time to complete the accounting.

Considering all these factors, we arrived at an estimated cost of 2.5 million dollars to produce a post 1946 Navajo accounting. A breakdown of this estimate is as follows:

Description	Estimated Man-Years
Proceeds of Labor Accounts—Receipts and Property	50
Proceeds of Labor and Interest Accounts—Disbursements	20
IIM Receipts and Disbursements	25
Report Preparation and Supporting Activities	5
	100 @ $25,000 per man-year = $2.5 million

Based on the Navajo estimate, we can project a "ball-park" figure of approximately 2,000 man-years to prepare other post 1946 accounting reports. This is based on the assumption that there are at least 30 accounting claims remaining of which some may be as large as the Navajo. With our present staffing of about 100 people, it would take 20 years if we did only post 1946 accounting work.

A final comment on the post 1946 acounting. The BIA still accounts for Tribal Trust Funds in the same manner as it always has; that is, the same as any other reimbursable appropriation. Also, Tribal IIM accounts are still maintained as cash accounts with limited documentation retained by BIA. If the Government is going to be held to account for these funds in the strictest sense of a trustee, it is obvious that the BIA must at some point change its accounting system to conform to this requirement.

Sincerely,

/s/ Louis P. Cherpes

LOUIS P. CHERPES
Acting Director,
Indian Trust Accounting Division

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No. 78-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, *Petitioner,*

v.

THE NAVAJO TRIBE, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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THE NAVAJO TRIBE, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

This brief is filed by respondent, The Navajo Tribe, in opposition to the petition of the United States for a writ of certiorari to review the interlocutory judgment of the United States Court of Claims entered in this case on October 18, 1978.

QUESTION PRESENTED

The Government's statement of the Question Presented erroneously presupposes that the jurisdictional issue can properly be considered by the Court in this case as the record now stands. However, the jurisdictional issue has not yet been decided in this case; the

Court of Claims' decision below merely confirmed the long-standing rule that post-enactment relief can be granted under the Indian Claims Commission Act on a proper factual showing in accordance with established equity doctrines. Review of that decision would, therefore, be clearly premature. Regardless of the question's importance or the alleged burdens on the Government, its Petition should be denied because the Court cannot properly decide the issue until the Court of Claims has finally decided which issues may, under the Court's equity jurisdiction as the Indian Claims Commission's successor, involve events or transactions after the date of enactment.

The Petition asserts [p. 2] that "events and transactions" after enactment of the Indian Claims Commission Act are wholly excluded from the Commission's jurisdiction. That assertion is admittedly contrary to the Government's position in *Gila River Pima-Maricopa Indian Community* v. *United States,* 140 F.Supp. 776 (Ct. Cl. 1956) [Petition, pp. 6-7, 9] and numerous Court of Claims and Commission rulings which followed that decision over the last 23 years [Pet. App. A, pp. 27a-28a]. Moreover, the Government concedes [p. 11] that "an accounting is due for post-1946 *consequences* of earlier wrongs." Since, under the Government's theory, the Court of Claims has jurisdiction to consider some post-enactment "events and transactions," this Court cannot decide whether post-enactment "events and transactions" are jurisdictionally precluded until factual evidence is adduced and reviewed by the Court of Claims.

The question presented by the Petition is whether the jurisdictional issue is now ripe for decision in this

case. The questions raised by that issue are stated below, but they should not be considered until the record has been completed:

1. Whether Congress, in enacting section 2 of the Indian Claims Commission Act, intended the language precluding Commission consideration of any "claim accruing after August 13, 1946" to prevent the full consideration and determination of claims based upon wrongful conduct by the United States that began before and continued after August 13, 1946.

2. Whether, given the special remedial purposes of the Indian Claims Commission Act and the maxim that ambiguities in Indian statutes are to be construed in their favor, Indian tribes are to lose all right to a determination of such continuing-wrong claims where:

a) the Act for many years has been legally construed to allow the litigation of those claims by the Indian Claims Commission alone and that "interpretation does not cross the literal words of the statute";[1]

b) litigation in the Court of Claims prior to the expiration of the statute of limitations was effectively precluded by the 1956 ruling in *Gila River,* made at the behest of the United States, that the Indian Claims Commission, and not the Court of Claims, was the only appropriate forum to determine the post-enactment portion of continuing-wrong claims; and

c) it is too late now to file those claims in the other possible forum, the Court of Claims, because of the statute of limitations.

---

[1] Pet. App., at 15a.

COUNTER-STATEMENT OF THE CASE

The Court of Claims below denied the Government's motion for summary judgment, which collaterally attacked two rulings of the Indian Claims Commission:

1. *The Self-Dealing Issue.* The Commission repeatedly ruled that the Government's use of tribal funds to pay the costs of its own operations on the Navajo Reservation was wrongful self-dealing, that such wrongful use of tribal funds continued after the enactment date, and that the Government should prepare an accounting of such use of tribal funds to a current date. 31 Ind. Cl. Comm. 40, 52 (1973), 34 Ind. Cl. Comm. 432, 434-35 (1974), 36 Ind. Cl. Comm. 433, 434-35 (1975), 39 Ind. Cl. Comm. 252 (1976).

2. *The Individual Indian Money Issue.* The Commission ordered the Government to furnish to the Tribe a supplemental accounting covering tribal funds held in accounts outside the United States Treasury, called "Individual Indian Money" or IIM accounts, which were not fully disclosed by the General Accounting Office's (GAO) 1961 accounting report on Navajo tribal funds, and denied a further Government motion to exclude from the supplemental accounting 35 accounts established after the date of enactment. 31 Ind. Cl. Comm. 40, 44-46 (1973), 36 Ind. Cl. Comm. 181 (1975), 39 Ind. Cl. Comm. 10, 32, 252 (1976).

Since the IIM issue arose from the Commission's 1973 determination that the Government's 1961 accounting report was inadequate and must be supplemented, the statement on page 5 of the Petition that "no question arises here as to the sufficiency of its accountings for the period before August 13, 1946" is incorrect and misleading. The statement implies that

both the self-dealing issue and the IIM issue can be solved on the basis of the General Accounting Office's 1961 accounting report covering tribal funds held in Treasury accounts and some IIM accounts. The Commission's finding that the 1961 report was incomplete and must be supplemented shows instead that the identification of "wrongs" that continued after enactment must await completion of further accountings and the Court's determination of the wrongs involved.

The self-dealing issue arose from the Commission's award of partial summary judgment in the Tribe's favor for $10,584.76, 31 Ind. Cl. Comm. 40, 53 (1973), which included improper disbursements of tribal funds from Treasury accounts both before and after the date of enactment listed in the General Accounting Office's 1961 report under the heading "miscellaneous agency expenses." The Commission later vacated that judgment to the extent of $1,557.42, the amounts disbursed after the enactment date, and ordered the up-to-date accounting. 39 Ind. Cl. Comm. 252 (1976). The disbursements tabulated as "miscellaneous agency expenses" by the GAO staff did not include all disbursements of tribal funds for the Government's benefit shown in the 1961 accounting report, and the scope of the up-to-date accounting may not be entirely clear. There has not yet been a determination of either the total amount of tribal funds misapplied by the Government or the particular forms of self-dealing involved, whether before or after the date of enactment.

The Government's argument for exclusion of the 35 post-enactment IIM accounts was rejected by the Commission because the Tribe showed that the funds deposited in those accounts had been predominantly transferred from other accounts established and held

by the Government before the enactment date. The "wrongs" alleged by the Tribe in connection with IIM accounts included not only improper disbursements (including self-dealing) but failure to maintain adequate records (no records exist to support about $6 million of tribal funds disbursed), and violation of statutes requiring reservation revenues to be deposited in Treasury accounts on which 4% interest is payable. Until the supplemental reports are furnished and a determination of such pre-enactment wrongs has been made, it is not possible to project what post-enactment matters may be involved.

The Petition, therefore, asks the Court for a preliminary ruling that the Government may not be held liable or accountable for any "event or transaction" after the date of enactment, regardless of the nature of the wrong or any possible relation to pre-enactment events. The sole reason offered for the requested reversal of the long-standing contrary rule is the large expense forecast by the GAO's successor, the Indian Trust Accounting Division of the General Services Administration [Pet. App. B]. Yet the Government's additional accounting reports, already ordered below, must be completed before the jurisdictional issue can be decided by the Court of Claims and thus properly defined for this Court's consideration. Since pre-enactment wrongs have not been finally determined, the Government's expense for any additional accountings that may be required is obviously speculative, and the Division's estimate is monstrously overblown. As the affidavit attached hereto as Appendix A states, the policy of using tribal funds for the Government's benefit was abandoned in the 1950's, and the proliferation of IIM accounts also ceased a few years after 1951.

The Government's burdens in this case are by no means forbidding.

Finally, the Government's effort to obtain interlocutory review of its jurisdictional defense is contrary to the terms of the Indian Claims Commission Act, 60 Stat. 1054, as amended by 74 Stat. 829, 25 U.S.C. § 70s(b), set forth in Appendix B hereto. In 1960, after appropriation hearings in Congress, the Act was amended to allow interlocutory appeals from an order finding the Government liable. In *United States* v. *Fort Sill Apache Tribe,* 481 F.2d 1294, 1296 (Ct. Cl. 1973), the Court of Claims held that an interlocutory appeal could not be taken by the Government from an adverse ruling on a jurisdictional defense, noting "the major problem created by the appellant's position is that it just does not fit the statutory language. Disposition of a motion questioning the jurisdiction of the Indian Claims Commission would not reach the issue of liability on the merits." To grant a writ in this case would also be contrary to the statutory language, since the Government's liability has not been decided below.

ARGUMENT

I. The Petition Is Premature

The Petition asks this Court to review and reverse the Court of Claims' denial of the Government's motion for summary judgment on the ground that, strictly as a matter of law, the Court of Claims as the Commission's successor has no jurisdiction to entertain claims based on "events and transactions" after the date of enactment. Yet the Government concedes that jurisdiction *may* exist over post-enactment events and transactions depending upon the facts. Petition, p. 11. The Government's decision not to seek review of

the companion decision, *United States* v. *Gila River Pima-Maricopa Indian Community,* 586 F.2d 209 (Ct. Cl. 1978), which affirmed judgment against the Government after a full trial for payments before and after the enactment date of tribal funds for charges improperly imposed for operation and maintenance of a federal irrigation project, indicates that the evidence established the Commission's jurisdiction to grant post-enactment damages in that similar case. The wrong in *Gila River* was basically self-dealing, and the Court should conclude that the same issue here cannot be disposed of at this preliminary stage of the litigation.

Except with respect to the tiny amount of post-enactment "miscellaneous agency expenses" disclosed in the 1961 accounting report, the Court of Claims below did not assert jurisdiction over post-enactment events or transactions. Its decision merely held that such jurisdiction might become established by later evidence, depending on what facts are shown. The Court of Claims' jurisdictional decision will not be made until such evidence is adduced, perhaps within the next year or so.

The Government's motion for summary judgment raised the issue of whether the wrongful expenditures of tribal funds after August 13, 1946 should be viewed as isolated transactions giving rise to separate claims under the Act or were part of a continuing illegal administrative policy and practice for which a court of equity could grant complete relief. The Commission's order that the Government account for all such expenditures is nothing more than an order to produce information in the form of an organized report which is essential to the final resolution of the jurisdictional

question. *Dillman* v. *Hastings,* 144 U.S. 136 (1892). In any event, the Indian Claims Commission, and the Court of Claims as its successor, had jurisdiction to inquire into its own jurisdiction by ordering the Government to produce that information. See, *e.g., Harmon* v. *Brucker,* 355 U.S. 579 (1958). The Court held in essence that it could not decide that jurisdiction was lacking until the information was produced and the facts were before it.

This Court has repeatedly emphasized the strong policy reasons for declining to review interlocutory decisions. In holding that it did not have jurisdiction to consider an appeal of a denial of summary judgment, the Court in *Goldstein* v. *Cox* 396 U.S. 471, 478 (1969) explained:

> "In the absence of clear and explicit authorization by Congress, piecemeal appellate review is not favored, Switzerland Assn. v. Horne's Market . . . [385 U.S. 23, 24 (1966)], 17 L.Ed. 2d at 24 and this Court above all others must limit its review of interlocutory orders. Hamilton Shoe Co. v. Wolf Brothers, 240 U.S. 251, 258, 60 L.Ed 629, 633, 36 S. Ct. 269 (1916)."

See, also, *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176 (1955). In this case, Congress limited interlocutory appeals to matters involving determinations of the Government's liability, 25 U.S.C. § 70s(b), *supra.* The ruling below rejected the Government's jurisdictional defense, but it did not determine its liability, and would not be appealable before final judgment under the rule of *United States* v. *Fort Sill Apache Tribe, supra.*

The same principles embraced in those cases apply to petitions for certiorari addressed to this Court. Al-

though in certiorari cases there is no jurisdictional bar to the Court's consideration of interlocutory orders, such review should not be granted except in extraordinary cases. *American Construction Co.* v. *Jacksonville, T. & K. R. Co.,* 148 U.S. 372, 384 (1893); *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U.S. 251, 258 (1916).

II. The Decision Below Is Correct And Within The Court's Jurisdiction

The decision below correctly applied established doctrines of equity in this general accounting suit by the tribal beneficiary against its trustees, and its decision was clearly within the Congressional grant of jurisdiction in the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.,* as amended, quoted in pertinent parts in Petition, pp. 2-4. That Act granted jurisdiction, in law or equity, over all claims accrued as of August 13, 1946, the date of enactment. Respondent's claim for a general accounting is a classic equitable claim that accrued before August 13, 1946, and respondent's timely filed petition conferred upon the Indian Claims Commission full equity jurisdiction over the subject matter of the suit. There is no reason to suppose that Congress, once having granted jurisdiction over the subject matter of that accounting claim, intended to impose restrictions on the Commission's authority to apply all established doctrines of equity in adjudicating the claim. In accordance with the doctrine that equity will grant full relief, the Commission once having obtained jurisdiction of respondent's accounting claim retains jurisdiction over all aspects of the case. *Porter* v. *Warner Holding Company,* 328 U.S. 395 (1946).

The Government's theory that each illegal or erroneous act by the federal trustee must be treated as a separate cause of action for damages deliberately confuses the Commission's clear equitable jurisdiction with the Court of Claims' ordinary jurisdiction over legal actions sounding in contract. The argument that each defalcation is a separately actionable wrong is novel nonsense in the context of a general accounting suit.

In *Hall's Western Auto Supply Co.* v. *Brock,* 400 P.2d 5 (Ore. 1965), the Supreme Court of Oregon held that the assignee of a debtor's wages must account to the creditor for all funds which came into its possession after the suit for an accounting was commenced. The court held:

> "Equity, having once gained jurisdiction, will proceed to dispose of the matter fully. Plaintiff is entitled to an accounting of those funds, if any, in Budget Consultants' possession or control at the time of service of process and coming into its hands subsequent thereto. *An accounting is not limited to conditions existing at the time the suit was instituted but covers all matters up to the final stating thereof.*" 1 C.J.S. Accounting § 41b, p. 683.

See, also, *Bearse* v. *Lebowich,* 125 N.E. 621 (Mass. 1920); *Ensign* v. *Faxon,* 118 N.E. 337 (Mass. 1918); *cf., Johnston* v. *Farmers and Merchants Bank,* 93 S.E. 2d 916 (S.C. 1956).

Under traditional rules of equity, the suit for a general accounting is, itself, the beneficiary's claim. If an accounting rendered in the suit discloses a series of improper transactions, the trustee will be "surcharged" to restore to the trust the amounts it would have held had the improprieties not occurred, in accordance with the maxim "equity treats as done what should have

been done." *Restatement of Trusts,* 2d (1959) § 205; Bogert, *Trusts and Trustees,* (2nd ed., 1962) § 971. Each instance of wrongdoing does not become a separate cause of action at law for debt. Equity has inherent power to order the trustee to make good all malfeasance disclosed by his account. The Court does not lose jurisdiction until the account is finally and properly stated, the trust is restored in accordance with the account, and the trustee is discharged for the period of the account. Based on those principles, the decision in *Southern Ute Tribe* v. *United States,* 17 Ind. Cl. Comm. 28 (1966), *aff'd,* 423 F.2d 346 (Ct. Cl. 1970), ordered the Government to prepare up-to-date general accountings for the tribal beneficiary. That decision was a correct application of equitable doctrines.

The Commission later modified those basic rules to require up-to-date accountings only where wrongful action had occurred before the date of enactment, and the wrong was of the nature that it continued to occur after that date. *Papago Tribe* v. *United States,* 26 Ind. Cl. Comm. 365 (1971). The Commission thereby invoked the rule that equity grants complete relief for "continuing claims." That rule is especially, but not exclusively, applicable in trust accounting suits.

In this case, plaintiff's claim or suit for a fiduciary accounting is based on the Government's self-imposed assumption of a trust relationship with the plaintiff under its laws and the Treaties of September 9, 1849, 9 Stat. 974, and June 1, 1868, 15 Stat. 667, and its failure to account to the Navajo Tribe for its action as trustee. That claim was fully accrued before August 13, 1946. Respondent's original petition, which sought an accounting and did not set forth a multitude of causes of action, belies any notion that its claim arises

in separate transactions as subsequently disclosed by the Government's 1961 accounting report. The "claim" is the suit for an accounting. Once that suit was commenced by the timely petition, the Commission acquired full equity jurisdiction and could proceed to grant complete relief. Congress placed no restrictions on its grant of jurisdiction under the Indian Claims Commission Act, and the decision below was correct.

III. The Government Exaggerates The Importance Of The Issue On The Basis Of An Unsworn, Inaccurate Letter.

The principal ground urged by the Government for the issuance of a writ of certiorari is that it would be expensive for the Government to prepare for trial of "continuing wrong" issues. Since those issues have not yet been identified below, it is obvious that the Government has no real basis for its argument that great burdens are involved. The Brief in Opposition to the Petition filed by the Nez Perce Tribe examines the Government's claim in great detail and shows it to be entirely bogus. The Navajo Tribe approves the Nez Perce Tribe's response.

The foundation for the Government's entire argument that the issues presented warrant the Court's review is a self-serving, unsworn letter that does not even appear in the record of this case. The letter attached as Appendix B was written 20 days after the Court's decision below at the request of the Government's attorney in this case for the obvious purpose of impressing this Court with the alleged consequences of the decision below. The letter is deceptive in several important aspects. See Affidavit of Paul J. Gillis, Certified Public Accountant, attached hereto as Appendix A. The Government employee who wrote the

letter made a generous guess of the time and money that might be required to update the Government's accounting reports, not only in this case, but also in the hypothetical cases of several other Indian tribes which may present similar issues. The author of the letter apparently assumed that a full general accounting of all of the Government's transactions as trustee on behalf of the Navajo Tribe from 1946 to date would be ordered by the Court. That assumption flies in the face of the decision below which limits the Court of Claims' jurisdiction to those instances in which the plaintiff can show an actual pre-1946 wrong which continued thereafter. Defendant can hardly be expected to concede that virtually every action it took as respondent's trustee was part of a continuing wrong. Yet the estimate was apparently based on that assumption.

There is also no basis for the assumption that any significant post-1946 accounting would be required for a multitude of other Indian tribes. It is highly unlikely that, as the letter suggests, any other Indian accounting case would approach the magnitude of the Navajo claim. The Navajo Tribe is not only the most populous tribe in the country; its assets, for which the Government must account as trustee, far exceed those of other tribes. While the Government's exaggerated estimate of the amount of time necessary to complete the Navajo accounting reports is based on the proceeds of a reservation of approximately 14,000,000 acres, an area containing coal, timber, uranium, oil, and other resources, the Government must account to the Nez Perce Tribe only for its actions with respect to the property and proceeds of a 32,000-acre reservation.

The Government's letter is not only based on unwarranted assumptions, but is also factually incorrect.

For example, it states that as to tribal IIM accounts the pre-1946 report covered a period of 10 years and the post-1946 report will cover more than 30 years. Actually, the Government's initial report showed IIM receipts and expenditures through 1951, a 15-year period. All but a few of the tribe's IIM accounts were closed within the two or three years following 1951. Plaintiff's IIM accounts were virtually eliminated by 1958.

Finally, it is instructive to compare the letter's unsworn estimates with the Government's testimony on this subject cited in its petition for certiorari No. 515, filed August 10, 1970, in *United States* v. *Southern Ute Tribe*. That petition said on pages 10 through 11:

> "At recent congressional hearings [*Indian Claims Litigation,* 91st Cong., 2d Sess., April 10, 1970], the Archivist of the United States, Dr. James P. Rhoades, stated that to bring 32 of the Commission's 44 pending general accounting cases down to 1969 would require an additional 224 man-years of labor—for a staff of thirteen, this would take until 1977."

Now, nine years after this estimate, the Government claims that to bring the accountings in two fewer cases (30 instead of 32 cases in 1970) down to 1980 would require about ten times the man-years formerly estimated for the work through 1969. The Government's 1970 projection included the Navajo accounting case—the largest of them all—while the Government's present 2,000 man-year figure excludes the Navajo work. The startling contrast between the projection given to Congress, which was in a position to question the accuracy of the statement, and the unsupported estimate offered to the Court as an unsworn attachment without cross-examination speaks for itself.

Moreover, the testimony at the 1970 hearings, *supra*, pp. 54-55, showed that there are faster, less expensive ways which may be acceptable to the parties to develop the necessary post-1951 accounting information. Referring to the annual publication of the Treasury Department showing disbursements by funds and appropriations, Indian office operating statements and tribal budget files, Dr. Rhoades stated:

> "While these sources might not provide the exactness and precision of information which would be shown by a full-scale audit, it is believed they are sufficiently accurate to serve as a basis for settling the post-1951 period, and their use would avoid the need for heavy personnel expenditures and long delays in completion of the reports."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

AFFIDAVIT

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

PAUL J. GILLIS, being duly sworn, deposes and says:

I am a Certified Public Accountant and have been engaged in public accounting for more than twenty-one years. My background encompasses more than fifteen years experience in Indian Tribal claims cases, including the location and evaluation of Government records pertaining to Indian funds and properties, as well as the preparation of reports.

In response to William C. Schaab's request I have reviewed the Petition for a Writ of Certiorari to the Supreme Court of the United States in *United States v. Navajo Tribe of Indians,* No. 78-1329, as well as the letter dated November 17, 1978 from the General Services Administration (GSA) to the Department of Justice, which was attached to the Petition as Appendix B. I have set forth below my opinions on that letter and the reasons for them.

I believe that the letter is self-serving, speculative and highly exaggerated as to the time required to render up-to-date accountings. My opinion is based upon the following.

1. The estimates of time necessary to render up-to-date accountings appear to be based upon the GSA's experience in the Navajo claims. The Navajo cases are an erroneous basis for such estimates. As the expert accountant witness for the Navajo Tribe as well as for more than twenty other tribes, I can safely state that the Navajo case is more complex and of broader scope than any three or four other tribal accounting claims put together. It is therefore the most self-serving "yard-stick" for the Government to use as the basis for its speculations about the time needed to complete its work.

2. Secondly, the Government's estimates of time appear to be based upon the assumption of the preparation of general accountings for the period after 1946. This assumption, whether inadvertent or deliberate, is in error as it ignores the nature of Plaintiffs' claims and the Court's treatment of them. My experience suggests that accountings for "continued wrong-doings" will be specific in nature, and will be based upon the Plaintiffs' (Tribes') having demonstrated (from their own examination of the Government's records) that the wrong-doings continued.

3. Thirdly, the letter of the GSA overlooks the facts that some portions of the "accountings" have already been done by others and that additional help may be available from the Bureau of Indian Affairs as well as from the GSA's own Records Centers.

4. Finally, my experience with the General Services Administration leads me to conclude that there are two ways of getting the job done: (1) the quick way, and (2) the Government's way. They seldom, if ever, do an accounting the quick way if they can do it the slow way. This has added great time and cost to the resolution of these cases for the parties involved (including the Government).

With regard to the accounting for funds after 1946, I would like to present the following observations:

1. After the decision in *Sioux Tribe v. United States,* 105 Ct. Cl. 725, 64 F.Supp. 312 (1946), the use of tribal funds for administrative purposes by the Bureau of Indian Affairs declined noticeably. This should diminish the need for pervasive disbursements accountings. Furthermore, about this time the "Operating Statement" (Form 7-Illus. 46A) instituted by the BIA should, if used, provide both parties to the claims with helpful information as to the necessity for, and scope of, post-1946 disbursements accountings.

2. Any claims pertaining to the payment of interest or the investment of non-interest-bearing funds are largely

legal matters and will require minimal accounting efforts. For example, I have prepared a preliminary restatement of all Navajo tribal funds for the period 1937 through 1975 showing the balances which the various accounts would have held if the Government had avoided certain practices. This restatement of accounts, including location of records, took less than one man-year of time. It was accomplished in an expeditious manner through the use of Treasury Cash Ledgers (Form 1014-A). Further time was saved through the use of semi-annual interest calculations, rather than getting bogged down in numerous computations of interest on daily balances. Such methods produce an acceptable result without involving detailed accountings of daily receipts and disbursements.

3. I seriously doubt the necessity for substantial accountings to October 1, 1980 for tribal funds carried under the designation of "Individual Indian Monies" (IIM). Based upon my experience, such activity substantially ceased around 1958 for many tribes, including Navajo. Activity after that date with respect to the Navajo Tribe was limited to one IIM account of modest size. Thus, extensive, detailed accountings after 1958 are unnecessary, and any computation of time based upon the necessity of voluminous, detailed IIM accountings from 1946 to 1980 is in error.

I hope that this summary will be helpful in putting in perspective the post-1946 "continued wrong-doings" cases and the accountings for them.

/s/ Paul J. Gillis
Paul J. Gillis, C.P.A.

Subscribed and sworn to before me this 10th day of April, 1979, by Paul J. Gillis.

/s/ Richard Geary Dompka
Notary Public
Seal, Notary Pub. of Mont. Co., Md.
My Commission expires:
July 1, 1982

APPENDIX B

The pertinent provision of the Indian Claims Commission Act of August 13, 1946, Pub. L. No. 79-726, 60 Stat. 1049, as amended by the Act of September 8, 1960, Pub. L. No. 86-722, 74 Stat. 829, is as follows:

> "Sec. 20(b) [25 U.S.C. § 70s(b)] When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determination, whichever is later: *Provided,* That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case. . . ."

No. 78-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,
Petitioner,

v.

NEZ PERCE TRIBE OF IDAHO,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

This brief is filed by respondent, the Nez Perce Tribe of Idaho, in opposition to the petition of the United States for a writ of certiorari to review the interlocutory judgment of the United States Court of Claims entered in this case on October 18, 1978.

QUESTIONS PRESENTED

1. Whether the language in section 2 of the Indian Claims Commission Act, which precluded consideration of any "claim accruing after August 13, 1946", was intended by Congress to prevent the full consideration and determination of claims arising from continuing wrongful conduct by the United States that began before and continued after August 13, 1946.

2. Whether, given the special remedial purposes of the Indian Claims Commission Act and the general maxim that doubtful provisions in Indian statutes are to be construed in their favor, Indian tribes are to lose all right to determination of continuing wrong claims where:

   a) The statute involved for many years has been construed to require the litigation of those claims by the Indian Claims Commission alone and that "interpretation does not cross the literal words of the statute";[1]

   b) Filing of continuing wrong claims in the Court of Claims was effectively precluded by the Court's ruling in *Gila River*,[2] made at the behest of the United States, that the Indian Claims Commission, and not the Court of Claims, was the only appropriate forum to determine the post-1946 portion of continuing wrong claims; and

   c) Because of the statute of limitations, it is too late now to file in the other possible forum, the Court of Claims, those portions of a continuing wrong claim based upon wrongs that occurred more than six years ago.

COUNTER-STATEMENT OF THE CASE

Respondent offers the following additions and corrections to the petitioner's statement of the case:

1. In the decision below, the Court of Claims narrowly circumscribed the scope of the continuing wrong doctrine. While the Indian claimants pressed the court to restore

[1] Pet. App., at 15a.

[2] *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 135 Ct. Cl. 180 (1956), 157 Ct. Cl. 941 (1962).

the rule of *Southern Ute* v. *United States*[3] and compel a full up-to-date general accounting, the court rejected that contention in favor of the much more limited application of the continuing wrong rule which was adopted by the Indian Claims Commission after *Southern Ute*.[4] It held that jurisdiction of the Indian Claims Commission (or the Court of Claims as successor) over post-1946 claims, and the right to a post-1946 special accounting, *first* requires proof of a continuous course of wrongful conduct beginning prior to the 1946 date and extending past it, and that the jurisdiction is limited to following those demonstrated specific wrongs into the future for one year, five years, or until whenever the wrongful conduct ceased.[5]

2. The government implies in note 3, page 6, of the petition that the 1956 and 1962 decisions in *Gila River* were limited to the *Gila River* claim described in the note. In fact, the continuing wrong rule in those decisions involved five claims, including a demand for a general accounting.[6]

3. The *Navajo*, *Nez Perce* and *Gila River* cases were consolidated for consideration of their common issue, the plaintiffs' asserted right to a post-1946 accounting. Of the three cases, only *Gila River* had had a trial on the facts. In the other two cases, particularly in *Nez Perce*, the issue was argued in the abstract on motions to dismiss or for partial summary judgment.

4. A unanimous court below reaffirmed the general principle asserted in *Gila River* that the Indian Claims Commission had jurisdiction beyond August 1946 of con-

[3] 17 Ind. Cl. Comm. 28, 63, 65 (1966), *aff'd*, 191 Ct. Cl. 1, 423 F.2d 346 (1970), *rev'd on other grounds*, 402 U.S. 159 (1971).

[4] *Papago Tribe* v. *United States*, 26 Ind. Cl. Comm. 365, 369 (1971).

[5] Pet. App., at 27a, 28a.

[6] *See* Pet. App., at 12a n.13.

tinuing wrongs—Judge Nichols disagreed only on the issue of what constitutes continuing wrong within the meaning of *Gila River*.[7]

5. The Gila River Tribe and the Nez Perce Tribe, as well as the Navajo Tribe, relied upon that court's decisions in *Gila River* as directing them to litigate all claims arising prior to August 13, 1946, and continuing thereafter, before the Commission and putting them on notice that the court would not entertain claims based upon what was essentially an Indian Claims Commission claim.[8] The Court of Claims in the decision below pointed to

> the unfairness of now departing from a substantial position which this court adopted, many years ago, at the behest of the defendant and which has been accepted since that time by the Indian claims community as a clear signal that the Commission had jurisdiction over these "continuing" claims and that protective actions need not be filed in this court under 28 U.S.C. § 1505.[9]

[7] *See* Judge Nichols' concurrence, Pet. App., at 32a-33a.

[8] And so informed the Court of Claims in their brief.

[9] Pet. App., at 24a.

ARGUMENT

The effect of the Court of Claims' decision is limited to claims brought under the Indian Claims Commission Act. All claims under that Act were required to be filed by August 1951, and no new claims may be filed under that Act. The Commission itself has been dissolved and its remaining cases transferred to the Court of Claims. The decision is, therefore, applicable only to a dwindling number of claims and for a very limited time span into the future. No important question of federal law is posed and no issue worthy of the Court's consideration is presented.

1. The Petition relies on exaggerated and unsupported evidence outside the record.

The basic ground offered for certiorari is the asserted "enormous" expense that will be required for the government to obey the mandate of the Court of Claims "in respect of events occurring after August 13, 1946."[10] The government, of course, is entitled to advocate its point of view, and a heavy projected cost of a rule of law is a legitimate concern for the government. "The fact that a large amount of money is involved is not, however, ordinarily grounds for review by the Court."[11] Furthermore, in seeking the Court's attention the government has grossly exaggerated the economic consequences of the rule it attacks, and moreover, to buttress its argument it has (1) offered opinion evidence developed for the purpose of

[10] Pet., at 9.

[11] Stern and Gressman, *Supreme Court Practice* 289 (5th ed. 1978). *Cf. Commissioner* v. *Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 n.5 (1977).

What is more appalling about this argument is that it suggests that the greater the harm suffered by reason of the government's breach of trust, the smaller should be the possibility that the government shall have to respond in damages.

its petition outside the record, involving grossly biased and unsupported statistics,[12] and (2) omitted pertinent facts.

a. Congress has considered and rejected the argument that the difficulty of providing post-1946 accounting is reason for denying the Commission jurisdiction to order such accountings. In the hearings that resulted in the 1972 extension of the Indian Claims Commission Act, the Committees of Congress were informed over and over again by government attorneys, by witnesses speaking for the Indians, and by the members of the Indian Claims Commission that the Commission was requiring the government to bring all accounting reports up to date, *i.e.*, including the post-1946 years. A representative from the Department of Justice testified to that effect, and urged that the Commission had exceeded its jurisdiction.[13] Another representative of the Department urged that the personnel available to prepare the accounting reports was insufficient to do the job.[14] With this information before it, Congress through its Committees made plain its intent that a sufficient staff of necessary personnel be assembled to provide the accounting reports ordered by the Indian Claims Commission, which, as Congress knew, would include post-1946 accounting.[15]

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[12] Pet., App. B.

[13] *Hearing on S. 2408 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (1971) (statement of Shiro Kashiwa).

[14] *Hearing on H.R. 10390 Before the Subcomm. on Indian Affairs of House Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess. (1972) (statement of Kent Frizzell).

[15] S. Rep. No. 682, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 895, 92d Cong., 2d Sess. (1972).

b. The asserted extent of the work that would have to be undertaken by the government's Indian Trust Accounting Division should the Court of Claims decision be allowed to stand, is based in part upon the unsupported opinion of the acting director of that Division, given in response to a request by government counsel[16] for "an estimate of the manpower resources that would be needed to produce an accounting report for the period September 1, 1946 to October 31, 1980". The estimate ignores the fact that the decision of the Court of Claims specifically *rejected* the Indian parties' contention that they were entitled to a general accounting, up to date, and adopted instead the Indian Claims Commission's interpretation that its authority to order the government to provide post-1946 accounting is *limited* to special accountings in aid of determining the full import of specific acts of mismanagement of Indian funds or other property committed by the government prior to August 1946, and continuing for some length of time thereafter.[17] These post-1946

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[16] Letter from Louis Cherpes to Donald Mileur (Nov. 7, 1978) (Pet. App., at 43a). The letter was prepared less than a month after the decision of the Court of Claims below and was apparently specifically designed for submission to this Court. Since the letter was presented in a manner that precluded any cross-examination of its author or authors, the precise circumstances surrounding its creation and the precise basis for the conclusions drawn can only be the subject of speculation at this time. In any event, as shown by letter of an accountant who has experience in working with the government's fiscal records, the estimate is woefully inaccurate and speculative. Resp. App. D. *See also* Brief in Opposition to Petition filed by the Navajo Tribe, App. A.

[17] *Navajo Tribe* v. *United States*, 36 Ind. Cl. Comm. 433 (1975); *Lower Sioux Tribe* v. *United States*, 36 Ind. Cl. Comm. 295 (1975); *Three Affiliated Tribes* v. *United States*, 36 Ind. Cl. Comm. 116, 130 (1975); *Gila River Pima-Maricopa Indian Community* v. *United States*, 35 Ind. Cl. Comm. 209, 214 (1974); *Northern Paiute Nation* v. *United States*; 34 Ind. Cl. Comm. 414, 417 (1974); *Blackfeet Tribe* v. *United States*, 32 Ind. Cl. Comm. 65, 75 (1973).

accountings are allowed only as the Indians can demonstrate that specific wrongs occurred prior to August 13, 1946, and that they continued past that date.[18] This certainly limits substantially the post-1946 transactions for which the government will be required to account.

The effect of the Court of Claims' interpretation of section 2 of the Indian Claims Commission Act as allowing the court to consider an award of damages for continuing wrongs is therefore extremely limited.[19]

c. The government asserts that the decision herein "may affect as many as 30 other cases." [20] The hedging words "may" and "as many as" are well-taken. If, as the government states, these 30 cases are "now awaiting initial adjudication", the government's position is most unreasonable based as it is upon the prognosis that in all 30 cases pre-1946 wrongs will be proven and that each such wrong continued past 1946, so as to trigger the government's obligation to file post-1946 special accountings thereon.[21]

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[18] *Hopi Tribe* v. *United States*, 33 Ind. Cl. Comm. 72, 80 (1974); *Papago Tribe* v. *United States*, 26 Ind. Cl. Comm. 365, 367 (1971).

[19] It cannot, therefore, be truthfully said that "The question . . . remains as important now as it was in 1970," when the government filed a petition for writ of certiorari in *United States* v. *Southern Ute Tribe*, No. 515, Oct. Term 1970. Pet., at 10. In 1970, the issue was presented to this Court in context of a ruling by the Indian Claims Commission, affirmed by the Court of Claims, that the Indians were entitled to post-1946 *general* accountings. *Southern Ute Tribe* v. *United States*, 17 Ind. Cl. Comm. 28 (1966), *aff'd*, 191 Ct. Cl. 1 (1970). Pursuant to that ruling, the Commission on June 10, 1970, issued an unpublished order requiring the defendant to furnish an up-to-date general accounting to the Shoshone-Bannock Tribes, plaintiff in Docket 326-C. On July 11, 1973, the Commission revoked its order in Shoshone-Bannock, having in the interim limited the rule. *Papago Tribe* v. *United States*, 26 Ind. Cl. Comm. 365 (1971).

[20] Pet., at 8.

[21] The few cases in which the Commission actually ruled on identification of specific continuing wrongs suggest the probability that some, possibly a large percentage, of the pending cases will produce rulings of no continuing wrong (as in *Yankton Sioux Tribe* v. *United States*, 37 Ind. Cl. Comm. 64 (1975)) or very limited need for further work on the part of the government's accountants, as in *Kiowa, Comanche & Apache Tribes* v. *United States*, 29 Ind. Cl. Comm. 476 (1973), where the post-1946 accounting was limited to lease income from a specific small tract of land to determine if and when the government turned that income over to the tribe. In *Gila River Pima-Maricopa Indian Community* v. *United States*, 38 Ind. Cl. Comm. 1, 7, *aff'd*, 586 F.2d 209 (1978), the continuing wrong doctrine was applied only to improperly collected operation and maintenance charges—a specific annual disbursement.

It is also unreasonable to assume that each continuing wrong will have to be litigated.[22]

2. Navajo case is *sui generis*.

Even assuming that the Court will find one or more transactions involving mismanagement of Indian funds and property by the government in all 30 cases beginning prior to August 1946 and continuing thereafter, the government's suggestion of the cost to the United States is grossly exaggerated since it is admittedly "based on the Navajo estimate".[23] The *Navajo* case is obviously not a proper guide to the scope of work in other cases or to probable costs and is *sui generis*.

It is axiomatic that the cost in time and money of accounting to various Indian tribes varies directly with the size of the estate administered by the government. That estate consists of *tribal* lands, *tribal* funds and other *tribal* assets, so that the government has more to account for on an unallotted reservation than on an allotted reservation (allotment has the effect of trans-

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[22] In the recent past, at least four accounting cases were fully disposed of by compromise settlement. Three others were settled on all issues except post-1946 accounting. It is highly probable, if past experience is a guide, that once certain legal issues are disposed of many of the cases will be settled without the need of any formal accounting. Further, tribal accountants often work closely with the government accountants, and in some cases can obtain sufficient data informally to obviate the need for any formal accounting.

[23] Pet. Brf., at 8, 46a. Even the Navajo estimate is highly suspect. *See* note 16 *supra*; *Navajo* brief, section III; and App. A.

ferring property to individual Indians, who have no claims under the Indian Claims Commission Act).

The Navajo Reservation is by far the largest of all of the Indian reservations. It is often described as being as large as West Virginia, including 14,000,000 acres of tribal trust land. On the other hand, the Nez Perce Reservation comprises 32,000 acres of tribal trust land.

Navajo income-producing assets include timber, oil and gas, vanadium, uranium, coal and helium, as well as manufacturing plants to produce wood products, cement products, a cooperative store, income from trading posts, and probably much more. That Tribe's cash balance in the Treasury in 1951 was $3,242,431. The Nez Perce have income from grazing leases and sale of timber. The Nez Perce total cash balance in the Treasury as of June 30, 1951 was $166,047.[25] Of the other accounting claimants, some are smaller in land area and income-producing assets than the Nez Perce; none remotely approaches the land holding or income-producing assets of the Navajo.

It may be assumed that the cost of accounting services necessary to permit Indian plaintiffs to identify and obtain redress for continuing wrongs will not be beyond the reasonable cost of the government's desire to do justice, while protecting itself against unfounded claims. If, as the government seems to admit, any additional sums assessed against the United States would be for well-founded claims, the scope of which is highly speculative

[24] H.R. Rep. No. 2503, 82d Cong., 2d Sess. 60, 61, 68, 69 (1952). All figures in the text and Appendix A are taken from this report, of which the Court may take judicial notice. The 1952 statistics would be particularly relevant because they show the size of the estate to which the supplemental accounting reports, completed through June 1951, would be directed.

[25] App. A.

at this time, they should not be cut off on the mere possibility that they might engender "substantial additional sums assessed against the United States."

3. The decision below is legally correct.

Defendant's jurisdictional argument was presented to the Court below. It was carefully examined and rejected by the majority and partially rejected by Judge Nichols in his concurring/dissenting opinion.[26] The majority's reasoning cannot be improved upon by counsel.[27] De-

[26] In the court below the government took the extreme position that there was *no* Indian Claims Commission jurisdiction on the basis of a "continuing wrong" (Pet. App., at 28a). In this Court defendant edges away from that stance and focuses its attack on that aspect of the decision below which declared that a continuing wrong can be established by a showing of a continuous course of wrongful policy (Pet., at 11). If in fact the government has changed its position, elemental considerations of fairness would seem to require that it specifically explain any change. If the United States still adheres to the draconian view it took below, its petition lacks the candor which one expects to find in pleadings of the United States, particularly when dealing with the claims of its Indian wards.

[27] In summary, the court below reiterated its determination in *Gila River Pima-Maricopa Indian Community* v. *United States*, 135 Ct. Cl. 180, 140 F. Supp. 776 (1956), that nothing in the Indian Claims Commission Act precludes the application of the usual rule that a court, once having obtained jurisdiction of the persons and subject matter of a suit, retains such jurisdiction for all purposes, including the awarding of all damages accruing up to the date of judgment. Pet. App., at 13a-17a. It noted that a definition of the accrual of a claim for purposes of determining when jurisdiction may attach does not rule out an interpretation that jurisdiction, once properly undertaken, may continue in order to clean up once and for all the past wrongs going far back into our history—as Congress made clear it intended. The court below distinguished continuing wrong cases wherein the effect of statutes of limitation is tempered by recognizing new "accruals" of claims that would otherwise be outlawed. Pet. App., at 15a-16a.

The court found nothing in the Indian Claims Commission Act that indicated congressional intent requires claimants before the Commission to file the post-1946 portion of their continuing wrong claims in the Court of Claims. On the contrary, the court found

fendant distorts Judge Nichols' opinion, suggesting as it does (page 11) that the judge dissented wholly from the majority's opinion and that he took the position that the court's jurisdiction is limited to post-1946 *consequences* of earlier wrongs. In concurrence with the majority, Judge Nichols stated:

> I agree to this: if the Indian tribal claimant in a Claims Commission Act proceeding, 25 U.S.C. § 70a, establishes the wrongful invasion of any Indian account in government control, before the cut-off date of August 13, 1946, it has become entitled to a proceeding in equity in which the subsequent management of the fund must be accounted for, any division of the moneys into other accounts traced, and any wrongs made good, down to the date of final adjudication, whenever that may be.[28]

As Judge Nichols' statement emphasizes, the Commission (and now the Court of Claims as successor) is exercising equity jurisdiction in the accounting cases and principles of equity may and should be applied.[29] Ad-

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many indications of tacit approval by Congress of a Commission with sufficient jurisdiction to complete litigation which it began—(1) in the provision for insuring the Indian claimants a forum whether their claims accrued before or after August 13, 1946; (2) in the provision which allowed claims to be filed as late as August 1951; and (3) in the unlikelihood that Congress would have expected the claimants to file simultaneously two sets of proceedings in order to litigate a claim which arose prior to August 1946 and continued after that time.

[28] Pet. App., at 32a.

[29] There is nothing in this court's decision in *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U.S. 638, 644 (1918), cited by petitioner, pp. 10-11, which is in conflict with the decision of the court below. The court there held that "from the time the action accrues" meant "when a suit may first be legally instituted upon it." *Cf.* the Court of Claims' definition: "when the course of conduct was first ripe enough for suit in the Commission even though all the damaging transactions or incidents would not themselves occur for some years." Pet. App., at 14a-15a. This Court in *Louisville Cement* had no reason to consider the effect on jurisdiction of continuing wrong since the impropriety which was basis for the suit had been corrected long prior to the decision. It is most reasonable to assume that if the railroad had continued to overcharge the cement company after suit was first instituted, the company would not have been required to institute a whole new proceeding before the Interstate Commerce Commission in order to be reimbursed for additional overpayments.

mittedly, the Indian plaintiffs are offered half a loaf by the court below.[30]

4. To reverse the Commission's rule at this late stage would be unfair to those tribes which relied on it.

The Indian Claims Commission Act of 1946 provided that no claim "accruing after the date of the approval of this Act [August 13, 1946] shall be considered by the Commission."[31] Claims accruing prior to that date were required to be filed by August 13, 1951.[32] Within the intervening period, tribes were to be informed of their newly won right to sue for past wrongs and to retain attorneys; attorneys were to obtain Department of the Interior-approved contracts with the tribes and investigate their claims.

We have surveyed contract attorneys for a number of tribes to determine why most attorneys did not file duplicate suits in the Court of Claims to take care of any claims that arose prior to August 13, 1946 and continued during that interim period and thereafter, particularly accounting claims.[32a]

Prior to the court's decision in *Gila River*, the attorneys, including ourselves, relying upon one or more of the following principles of law, concluded that there was no need to file new claims in the Court of Claims:

(1) The usual rule is once a court takes jurisdiction it can award damages down to the date of judgment.

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[30] Pet. App., at 27a.

[31] 25 U.S.C. § 70a (1976).

[32] 25 U.S.C. § 70k (1976).

[32a] In partial response, *see* Resp. Apps. B and C.

St. Paul Indemnity Co. v. *Cab Co.*, 303 U.S. 283, 291-92 (1938).

(2) The "accrual date" of a continuing wrong would seem to be the date it started [33] and this would be so even if for other purposes the wrong were deemed to reaccrue every year.[34]

(3) An accounting is a single cause of action which accrues when the suit is filed.[35]

(4) The Court of Claims had no jurisdiction over claims for general accountings.[36]

Furthermore, in the period 1946-1951 most tribes did not know what continuing wrongs the government may have indulged in in the management of tribal funds and property because the government accounting reports were not filed until many years thereafter.[37] The *Gila River* attorney was faced with a different set of facts. First, the continuing claims were easily discernable: water charges paid under protest before August 1946 were still being demanded and paid under protest; water was still being diverted; leases which were considered unfair were still being renewed, etc. To protect those known claims, he filed duplicate claims in the Court of Claims. However, in 1956, *at the urging of the government*, the Court of Claims held that the Indian Claims Commission was

[33] *See* Pet. App., at 27a.

[34] *Id.* at 15a, 16a.

[35] *Id.* at 27a, 32a.

[36] *United States* v. *Jones*, 131 U.S. 1 (1889). Of course it was arguable that the court did have such jurisdiction under the post-1946 jurisdictional clause of the Indian Claims Commission Act, 28 U.S.C. § 1505, but this was a doubtful proposition, and was finally rejected in *Klamath Tribe* v. *United States*, 174 Ct. Cl. 483, 490 (1966).

[37] The government did not file its first accounting in *Navajo* until 1961 (Pet. App., at 26a). The Nez Perce accounting was not filed until February of 1968. *See also* Resp. Apps. C and D.

the only appropriate forum to determine the post-1946 portion of the continuing wrong claims.[38]

Had the court ruled the other way in 1956, it is certain that most, if not all, of the tribes would have filed in the Court of Claims all known and probable claims dealing with post-1946 transactions which they had theretofore expected to be heard by the Indian Claims Commission. The Court of Claims' six-year statute would have reduced recovery, but the point is the tribes could have protected themselves for most years if the *Gila River* decision had gone the other way—and without filing multiple suits thereafter because the continuing wrong, once picked up in midstream, would have been adjudicatable to its conclusion without any new petitions having to be filed.[39]

Respondent can state from personal knowledge that after 1956 a great majority, if not all, of the 30 plaintiffs relied upon the Court of Claims decision in *Gila River* in asserting continuing claims before the Indian Claims Commission and for that reason did not file separate post-1946 claims in the United States Court of Claims.[40]

It is interesting to note, while speaking of fairness, that, although the Court of Claims came to the same conclusion for the same reasons in all three cases—*Navajo*, *Nez Perce* and *Gila River*—the government has not

[38] *Gila River, supra.*

[39] The government does not question the application of the continuing wrong doctrine to claims filed originally in the Court of Claims.

[40] Counsel for respondent, Nez Perce Tribe, is also counsel in suits for general accounting filed in the Indian Claims Commission on behalf of six other tribes. Counsel also represented the Southern Ute Tribe and obtained a decision in *United States* v. *Southern Ute Tribe*, 423 F.2d 346 (Ct. Cl. 1970), *rev'd on other grounds*, 402 U.S. 159 (1971), wherein the Court followed *Gila River*. Counsel has relied upon *Southern Ute* and *Gila River* on behalf of all those tribes. *See, in accord*, statements of attorneys for other tribes. Resp. Apps. C and D. Under the circumstances, it is particularly inappropriate and unfair to treat the Nez Perce, the Navajo and other claimants who relied upon the Court of Claims' 1956 decision in *Gila River* different from the *Gila River* claimants.

sought *certiorari* in the *Gila River* case. Ostensibly, that is because counsel for the Gila River Indians relied to their detriment upon the position taken in that case by the government which was adopted by the Court of Claims in 1956. This concession seriously undermines the government's argument that the Court of Claims had no jurisdiction to make the award. Surely, jurisdiction does not depend on reliance on the Justice Department's position. If it does, the Nez Perce Tribe claims jurisdiction on the same ground.

It is ironic that the government, which in its attempt to right all wrongs permitted even claims based upon fair and honorable dealings not recognized by any existing rule of law or equity,[41] should be asserting that Indian claimants should be precluded forever from adjudicating claims on the merits because they followed the very procedure which the government itself caused to be established in the *Gila River* case.

CONCLUSION

For the reasons stated in this response, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[41] Indian Claims Commission Act of 1946, § 2(5), 25 U.S.C. § 70a (1976).

Appendices

APPENDIX A

MATERIAL, LAWS AND TREATIES AFFECTING INDIANS

VII. NAVAJO FUNDS AND ASSETS [p. 471]

Tribal funds

		Interest rate	Balance as of June 30, 1951
	NAVAJO AGENCY NAVAJO		
14X7341	Proceeds of Labor, Navajo Indians, Arizona and New Mexico, May 17, 1926, 44 Stat., 560	4	$3,077,906.29
14X7841	Interest and Accruals on Interest, Proceeds of Labor, Navajo Indians, Arizona and New Mexico, June 13, 1930, 46 Stat., 584		161,013.77
14X7144	Revolving Fund, Dental Work, Navajo Indians, Arizona and New Mexico, May 9, 1938, 52 Stat., 312-313	4	3,096.30
14X7492	Proceeds of Mining Leases, Navajo Indians, Arizona and New Mexico, April 17, 1926, 44 Stat., 300		140.00
14X7644	Interest and Accruals on Interest, Revolving Fund, Dental Work, Navajo Indians, Arizona and New Mexico, June 13, 1930, 46 Stat., 584		275.03
	Navajo Agency total		3,242,431.39

Income producing assets

Navajo Agency, Navajo Tribe:

Income from rented trading posts. The Pine Springs Trading Post, Houck, Ariz., was acquired by the tribe in 1934 and is rented to an individual for $350 a year. Dilkon Trading Post, Winslow, Ariz., was acquired by the tribe in 1942 and is rented to an individual for $1,000 a year. The Pinon Trading Post, Pinon, Ariz., was acquired by the tribe in 1942 and is rented to an association

comprising 12 members for $300 a year. The value of the Pine Springs Trading Post was estimated by the chief, Branch of Economic Development, at $15,000; Dilkon Trading Post, $10,000; and Pinon Trading Post, $2,500 — $27,500.00

Wide Ruins Trading Post (Mercantile center). Acquired by the tribe in August 1950 for $60,233.72, using part of the $79,000 borrowed from the tribal revolving credit fund. To June 30, 1951, the enterprise earned a net profit of $2,096.59. Net assets as of June 30, 1951, were $87,959.93, including merchandise inventory of $18,470.80. Cash in the amount of $1,952.35 is reflected in a separate section of this report $86,007.57

[p. 472]

Navajo Arts and Crafts Guild was established in 1941, with $15,000 borrowed from the United States under reimbursable agreements. In February 1951, the guild was reorganized and obtained a $10,000 loan under the tribal revolving credit fund, a $5,000 tribal grant and a $5,000 Government grant. The guild occupies buildings at the Navajo Tribal Fairgrounds which were transferred to the tribe in 1949 by the Government at the appraised value of $4,199. These buildings were repaired and remodeled by the guild at a cost of $5,011.40 and are presently valued at $15,000, according to the chief, Branch of Economic Development. During the fiscal year 1952, the guild operated at a loss of $3,307.19; however, in the last quarter of the fiscal year a net profit of $1,274.10 was realized. Net assets as of June 30, 1951, were $38,305.87, including inventories of $8,373.65. Cash of $10,968.31 is reflected in a separate section of this report.. 27,337.56

Cement products industry enterprise was authorized in February 1951, to construct and operate a plant for the manufacture of cement building blocks. In June 1951, a modified plan provided also for the operation of a sand and gravel pit and the manufacture of crushed rock. The enterprise was financed with a tribal loan of $96,000 and a Government grant of $4,000. As of June 30, 1951, construction was completed but the plant was not in production status. As of the same date, net assets were

$124,372.31, including fixed assets of $48,551.71. Cash in the amount of $75,435.10 is reflected in a separate section of this report.. 48,937.21

Sawmill Mercantile Center, a tribal enterprise, was acquired in August 1950, from an individual at a cost of $33,410 using part of $48,410 borrowed from the tribal revolving credit fund. Net profit to June 30, 1951, was $15,223.70. Net assets as of June 30, 1951, were $75,237.08, including merchandise inventory of $14,646.91. Cash in the amount of $26,302.74 is reflected in a separate section of this report 48,934.34

Ram Herd and Ram Pasture enterprise superseded that which was known as the Navajo Tribal Livestock Improvement Project (sheep improvement section) which was established in 1937 and financed by a reimbursable loan of $12,000. In June 1951, the enterprise borrowed $9,000 from the tribal loan fund, and both loans are to be liquidated under the provisions of the new plan of operation. Net assets as of June 30, 1951, were $49,929.94, including 396 rams valued at $9,000 and 5,900 pounds of wool valued at $2,600. Cash of $29,915.94 is reflected in a separate section of this report 20,014.00

Wood products industry enterprise was established in February 1951, to manufacture house and office furniture on the open market and to recondition used furniture. The enterprise borrowed $23,000 from the tribal loan fund and received a $4,000 Government grant. These funds were used to purchase, repair and remodel buildings and equipment of a privately owned trading post, purchase machinery, and for operating expenses. As of June 30, 1951, remodeling, including rental cabins, and installation of equipment, was completed and Navajo Indians were being trained for production. Orders in excess of $43,000 were on hand. Net assets as of June 30, 1951, were $28,006.14, including lumber inventory of $2,500. Cash of $2,455.07 is reflected in a separate section of this report $25,551.07

[p. 473]

Navajo Wingate Village Housing Project was transferred to the Navajo tribe in December

1949, by the Public Housing Administration, without cost, pursuant to the provisions of the Independent Offices Appropriation Act of 1950. The tribe made repairs and improvements during 1950 in the amount of $22,388, such amount being transferred to the tribal loan fund to which repayments will be made by the enterprise. The enterprise also received a Government grant of $1,000. The project furnishes housing facilities to employees of Fort Wingate Ordnance Depot, preference being given Navajo Indians, and consists of 57 two-bedroom units renting at $18 a month; 33 one-bedroom units renting at $15 a month; and 36 light housekeeping units renting at $12 a month. Net profits to February 28, 1951, were $6,705.43. Net assets as of the same date were $131,287.66, including buildings appraised at $104,975 ..... 131,287.66

Navajo tribal sawmill has been operated as a tribal enterprise since 1936. The mill employs an average of 275 Navajo Indians and produces approximately 14 million board feet of lumber a year. The sawmill is the largest tribal income producing enterprise. In October 1950, the enterprise loaned the tribe $500,000 which was used to finance the 1951 tribal budget in lieu of requesting tribal funds in the U.S. Treasury, drawing interest of 4 percent per annum. An additional $250,000 was loaned the tribe by the enterprise in July 1951, for the establishment of a tribal well drilling program. Net profits for the fiscal year 1951 were estimated to be $280,000. The financial records for the fiscal year 1951 had not been audited; however, according to figures furnished by the sawmill accountant, and records of the Indian Service Special Disbursing Agent, total assets of the enterprise as of June 30, 1951, were $2,528,018.37, including lumber and logs valued at $222,175.30 (lumber $183,175.30 and logs $39,000). Cash of $509,324.88 is reflected in a separate section of this report 2,018,693.49

Sheep Dipping Enterprise was established by the tribe in 1921, according to the extension agent's records. Net assets as of June 30, 1951, were estimated at $63,321.23, including 65

[p. 474]

dipping vats valued at $52,000. Cash of $5,837.79 is reflected in a separate section of this report 57,483.44

Many Farms Cooperative Store (Navajo Cooperative Association), a trading post activity, was established and financed by individual tribal members in 1941. As of June 30, 1951, there were 11 individual members; however, in August 1951, the tribe purchased shares of 3 individuals and it is anticipated that in the near future the tribe will acquire full ownership. Net profit from September 17, 1949 to May 10, 1951, was $910.09. Net assets as of May 10, 1951, were $41,119.96, including merchandise inventory of $10,171.96 and buildings valued at $20,000 which are owned by the tribe and occupied by the association rent free 41,119.96

Red Lake Cooperative Association (a trading post activity) was organized and financed by individual tribal members in May 1942. As of June 30, 1951, there were 28 members. Net assets as of September 6, 1951, were $33,516.10, including inventories of $15,690.27.... $33,516.10

Pinon Cooperative Association (a trading post activity) was organized and financed by individual tribal members in 1942. As of June 30, 1951, there were 12 members. In 1948, a branch store was established. No financial statements were available; however, as of June 30, 1951, the net assets were established by the manager to be $40,405.15, including inventories of $22,100. Cash of $4,005.15 is shown in a separate section of this report 36,400.00

In addition to the above enterprises, the tribe authorized on June 13, 1951, certain enterprises which have been financed through tribal loans and Government grants. There was no activity as of June 30, 1951, and all assets, which consist of cash, are reported under tribal organization funds. The enterprises and the amount of loans and grants are as follows:

Enterprise	*Tribal loan*	*Government grant*	
Clay Products Industry Enterprise	$6,000	$4,000	
Leather Products Industry Enterprise	6,000	4,000	
Native Materials Industry Enterprise	3,000	2,000	
Wool Textile Industry Enterprise	10,000	10,000	
Note.—Government grants referred to hereinbefore are those funds authorized by the Act of April 19, 1950 (25 U.S.C. 631-640, Supplement IV).			
Navajo Agency total			2,602,782.40
Oil and gas leases: During the fiscal year 1951, tribal income realized from bonuses from sales of leases, rentals and royalties was $1,245,279.92. Total income since first production in 1923 has been $4,992,586.28			1,245,279.92
Vanadium—Uranium leases. During the fiscal year 1951, tribal income from production royalties and lease rentals amounted to $151,204.65. Total income since first sales in 1942 has been $321,504.60			151,204.65
Navajo Agency total			1,396,484.57
Alamo Navajo Cooperative Store, a community enterprise financed by members of the community in 1940 as a nonprofit organization. Assets of the store total $12,634.99 as at July 9, 1951, including inventories of $4,220.39. Cash of $4,105.85 and securities of $4,810 are reflected in separate sections of this report			4,719.14
Tribe total			4,719.14

VIII. Nez Perce Funds [p. 480]

	Tribal Funds	Interest rate	Balance as of June 30, 1951
	Nez Percé		
14X7462	Proceeds of Labor, Nez Percé Indians, Idaho, May 17, 1926, 44 Stat., 560	4	$148,038.28
14X7962	Interest and Accruals on Interest, Proceeds of Labor, Nez Percé Indians, Idaho, June 13, 1930, 46 Stat., 584		12,431.47
14X7063	Nez Percé of Idaho Fund, August 15, 1894, 28 Stat., 331	5	2,193.33
14X7563	Interest and Accruals on Interest, Nez Percé of Idaho Fund, August 15, 1894, 28 Stat., 331		3,384.10
	Tribe total		166,047.18

APPENDIX B

LAW OFFICES

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April 6, 1979

Angelo A. Iadarola, Esquire
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

Re: *United States* v. *Navajo Tribe* and *United States* v. *Nez Perce Tribe*, both in the Supreme Court of the United States

Dear Angelo:

I write this letter as a contract attorney in the 10 general accounting cases identified below:

	Docket No.	Tribe
1.	19	Minnesota Chippewa
2.	188	Minnesota Chippewa
3.	189A	Minnesota Chippewa (Red Lake)
4.	189C	Minnesota Chippewa (Red Lake)
5.	115	Crow Creek
6.	116	Lower Brule
7.	118	Rosebud
8.	119	Standing Rock
9.	363	Lower Sioux
10.	226	Caddo

You have asked that I focus on the effect of the Court of Claims decision in *Navajo* and *Nez Perce* on the ten listed cases with respect to wrongs that occurred after

August 13, 1946, but had their roots in the period prior to that date.

Two points are important. First, after the Court decided the *Gila River Pima-Maricopa* case in 1956 (135 Ct. Cl. 180), we absolutely relied on that decision as protecting our "continuing wrong" claims, if any. Prior to the 1956 opinion, we did not file general accounting cases in the Court of Claims because the Court has no jurisdiction over such claims, only over claims for explicit wrongs. We could not file for explicit wrongs because the Government did not furnish us with the accounting reports revealing its handling of tribal moneys until years after the Gila River decision in 1956. Once that decision was on the books we relied on it and did not file.

The second point is that in their present posture the ten listed cases do not involve much with respect to continuing claims. As you know, where a tribe has small assets there is no room for significant recoveries. Tribal property was substantially extinguished during the period 1889-1913 by conversion to individual Indian allotments and disposition to homesteaders and others. In the first eight cases listed, the claims prior to July 1, 1926 are barred. The Commission held four by res judicata (Items 1-4) and four because the complaint was limited to the post July 1, 1926 period. Necessarily small amounts are involved *in toto* and any "continuing claims" reflect a small portion of the whole.

Sioux—Docket No. 363. (Item 9) The major claims relate to the period ending in 1896. The claims that might be defined as "continuing" are very small, since the bands owned virtually no land and had no income that the Government could mismanage on a continuing basis.

Docket No. 226—Caddo. (Item 10) The *Caddo* case has practically nothing in dollar amounts. The Caddo have had no reservation for 70 years. There is no "continuing claim" of which we are aware.

Kind personal regards,

Sincerely,

/s/ Marvin J. Sonosky
MARVIN J. SONOSKY

MJS/ibc

APPENDIX C

LAW OFFICES

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April 9, 1979

Angelo A. Iadarola, Esq.
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Re: Petition For A Writ Of Certiorari To The United States Court of Claims, United States v. Navajo Tribe; United States v. Nez Perce Tribe of Idaho, No. 78-1329

Dear Angelo:

This firm serves as counsel for the plaintiff tribes in six pending cases, filed with the Indian Claims Commission prior to August 13, 1951, which presented claims for a general accounting. The following is a list of the six cases and states the date of the initial accounting report that was prepared by the Government in each case in response to the suit:

Docket No.	Tribes	Date of Initial Government Accounting Report
22-G	Mescalero Apaches	June 18, 1969
22-H	San Carlos Apaches White Mountain Apaches	November 6, 1970
87-A	Northern Paiutes	April 25, 1963
178-A	Colville Confederated Tribes	July 26, 1966
184	Fort Peck Indians	January 26, 1960
283-B	Colorado River Indian Tribes	May 31, 1961

In each of these cases, the Government accounted in its initial report for receipts and disbursements of tribal trust funds through June 30, 1951, and in each of these cases, the report disclosed acts of mismanagement by the Government of tribal funds which were committed prior to August 13, 1946 and continued after that date.

Following the receipt of the initial accounting reports, we took steps in the pending cases to require the Government to furnish supplemental accounting reports relative to its post-June 30, 1951 management of the funds for purpose of ascertaining whether the earlier wrongful acts continued after June 30, 1951. Relying on the decisions of the Court of Claims in the *Gila River* case (135 Ct. Cl. 186; 157 Ct. Cl. 941), we considered that the Commission had jurisdiction of the continuing wrongs and that there was no need—and that it would be contrary to the decisions—to institute duplicate suits in the Court of Claims relative to the continuing wrongs.

Sincerely,

WEISSBRODT & WEISSBRODT

By /s/ I. S. Weissbrodt
I. S. WEISSBRODT

APPENDIX D

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April 11, 1979

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Re: Nez Perce, Docket 179-A

Dear Mr. Iadarola:

At your request, we have studied the letter of November 7, 1978, addressed to Mr. A. Donald Mileur by Louis P. Cherpes, which letter was incorporated as an appendix in the government's petition for writ of certiorari in *United States* v. *Navajo* and *United States* v. *Nez Perce Tribe.*

As Certified Public Accountant's (CPA's) working for a number of Indian tribes, we have audited and analyzed tribal accounting reports prepared by the General Services Administration Indian Trust Accounting Division and have performed independent research on tribal financial records in the United States Archives and elsewhere. In our work we have dealt with the government's fiscal management in both the pre-1946 period and the post-1946 period, up to 1974. On the basis of our knowledge of the nature of government records, procedures followed by the Indian Trust Division, and of modern accounting methods, it is our opinion that the estimate of 4 million hours (i.e. 2,000 man years) to prepare post-1946 accounting reports for some 30 Indian accounting claims is far in excess of the time which should be required to do the job. In addition, we take exception to Mr. Cherpes

estimate of $50 million to locate documents and prepare essentially correct accounting reports of the 30 Indian accounting claims.

Before explaining the basis of our opinion that the 4 million hours and $50 million is excessive, we believe it is important to distinguish between accounting and auditing.

An accounting is generally defined as the classifying, recording and summarizing of financial transactions and of interpreting their effects on the affairs and activities of an economic unit. Accounting itself has not changed materially in recent years, but the means—manually by a bookkeeper versus automatically by a computer—has undergone substantial advances. An audit on the other hand is concerned mainly with the verification of accounting records. Auditing procedures, which stress correctness, veracity and propriety of accounting records, are generally performed either by experts known as CPA's or government auditors whose education, training and experience provides the necessary expertise.

Indian accounting claims in our experience involve much more of an accounting function than an audit function as described above, although after completion of the accounting, auditing techniques are sometimes called for to verify the accounting records and transactions.

While we grant that finding the records may be a task, based on our experience we believe that it is generous to assume that it would take 19 accountants, historians and related personnel working no more than one year to find the records for 30 tribes. Once records are located, we believe the appropriate method to do the job would be to utilize a computer in the following steps:

First, accountants must manually examine each document, and classify and code the transaction in sufficient detail for keypunching. In our calculation of cost and required hours below, we used only 20 transactions per

hour to account for the few problem transactions which may take additional time to examine. In our experience in Indian Accounting cases, 20 per hour is on the low side; a good accountant should be able to do as much as 35 to 40 per hour.

Second, the coded transaction should be keypunched and keyverified to make ready for computer processing. In our calculations below, we estimate that a keypunch operator can type 1,600 transactions a day. This is about 80 percent of a normal daily standard for a good keypunch operator. Our calculation also includes a unit cost of twenty cents a transaction which is on the high side.

Third, the data as keypunched can now be processed on a computer. Our calculations below include not only processing costs, but supervision and programming cost to provide for proper printing and report format as output from the computer.

As a note for the record, the post-1946 disbursement documents mentioned by Mr. Cherpes as factor 4 in arriving at his estimates were randomly batched without regard to tribe. Use of the computer can facilitate the processing of the documents because while the steps performed in one and two above can be completed in a fairly random sequence, the computer can separate the data by tribal claims if the accountant assigns the proper tribe code in step one. We know that computer accounting methods are available to the government accountants. In at least one case in which we are employed, the Indian Trust Division is taking advantage of computers to lessen the complexity of an accounting involving a large number of transactions.

The fourth and final step involves an accountant's review and reconciliation of each report. We assumed that the accounting would require review of approximately 1,000 annual reports (33 years times 30 tribal claims). We

have assumed that all financial transactions in each of the 33 years for each of the 30 tribes would be included in the accounting. For our calculations, we have assumed 4,000,000 transactions for all tribes during those years. We have been advised that the actual claims will not cover all transactions nor all years. Therefore, our estimates are conservative.

In summary, our best estimate of the cost to provide a proper accounting for 30 claims covering 33 years, would be about $185,000 per claim, or $5.6 million for all 30 tribal claims. The average personnel hours for each claim we estimate to be 12,600, or a total of 376,000 hours for all cases. Assuming 2,000 hours worked each year, then the total 376,000 hours represents the equivalent of 188 man years, i.e. 188 accountants, keypunch operators, supervisors and computer personnel working one year on the case. This includes the personnel searching for documents for one year.

We believe that our estimates are reasonable, and are willing to provide the details used in arriving at our estimates.

Sincerely,

ROSS, LANGAN & MCKENDREE

/s/ Thomas P. Langan
THOMAS P. LANGAN
Partner
Certified Public Accountant

TPL/hk

April 11, 1979